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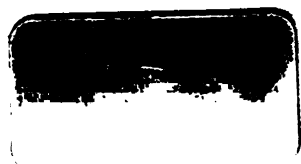
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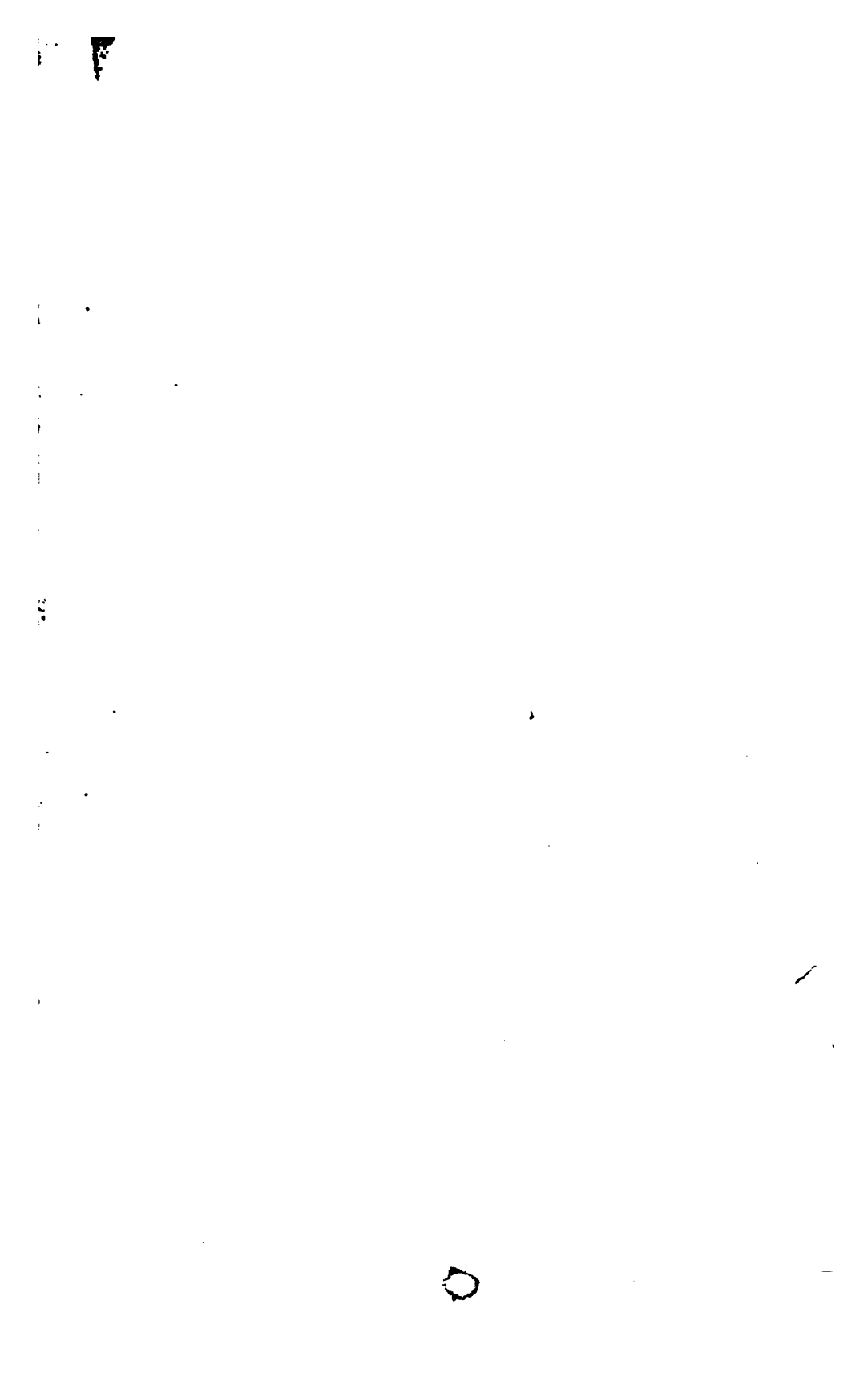
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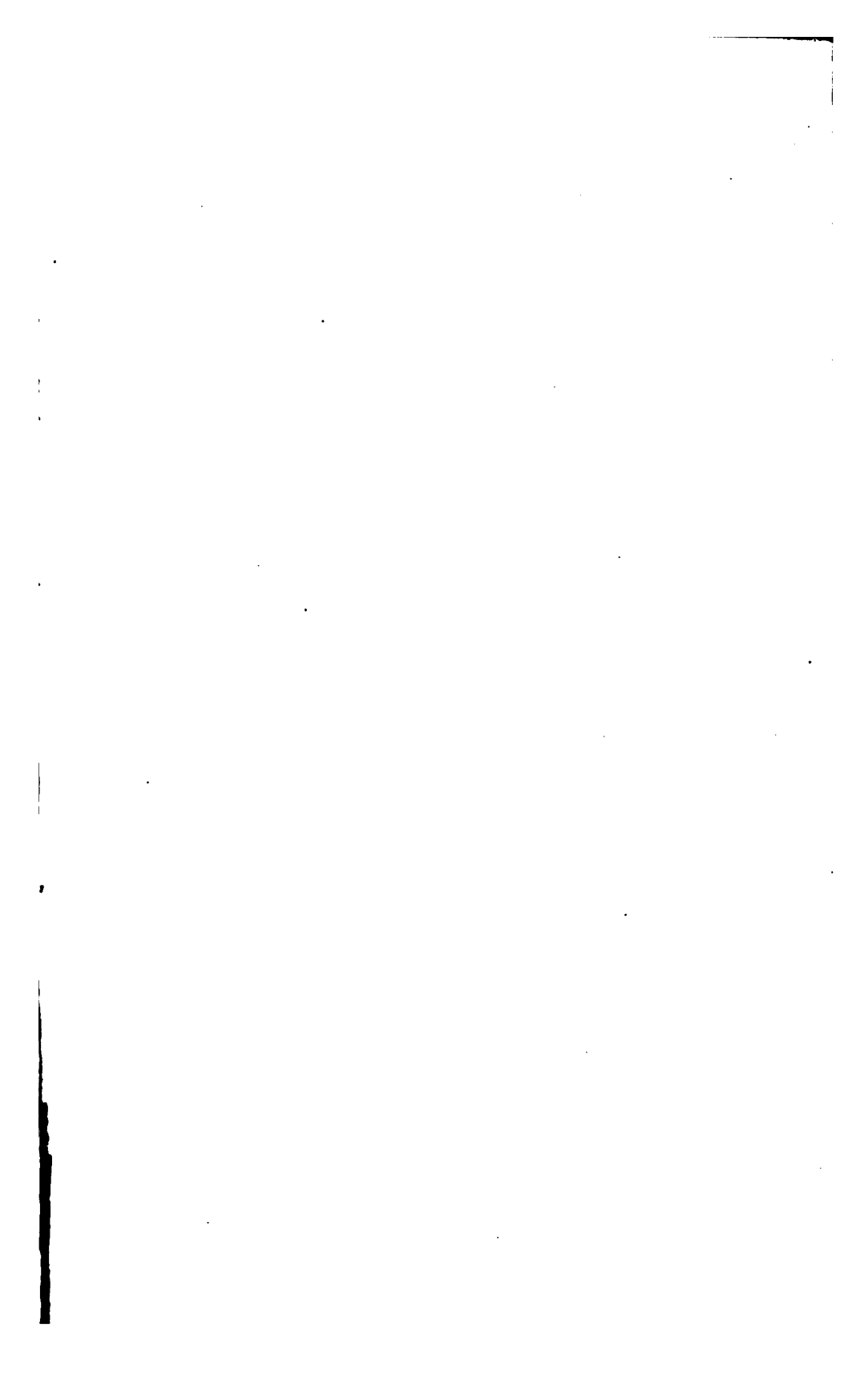


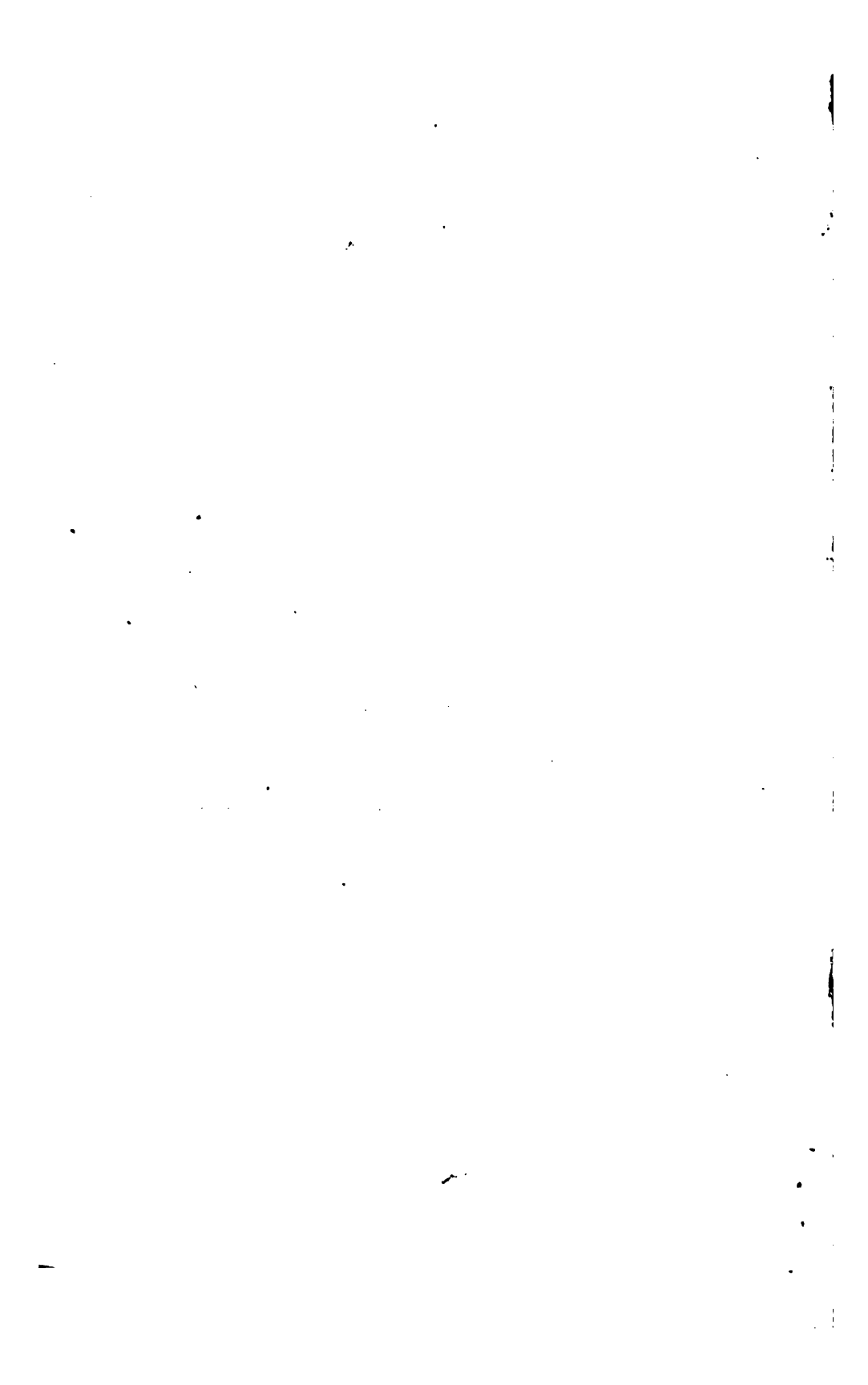
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REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF NEVADA,

DURING 1879 AND 1880.

REPORTED BY

CHAS. F. BICKNELL,

CLERK OF SUPREME COURT,

AND

HON. THOMAS P. HAWLEY,

ASSOCIATE JUSTICE.

VOLUME XIV.

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Rec. Aug. 3, 1880

JUSTICES OF THE SUPREME COURT.

HON. WILLIAM H. BEATTYCHIEF JUSTICE.
HON. ORVILLE R. LEONARD..... }
HON. THOMAS P. HAWLEY } ASSOCIATE JUSTICES.

OFFICERS OF THE COURT.

HON. M. A. MURPHY ATTORNEY-GENERAL.
CHAS. F. BICKNELL.....CLERK.
LLOYD HILL.....BAILIFF.

DISTRICT JUDGES OF THE STATE OF NEVADA.

1879.

FIRST DISTRICT	HON. RICHARD RISING.
SECOND DISTRICT.....	HON. S. D. KING.
THIRD DISTRICT	HON. W. M. SEAWELL.
FOURTH DISTRICT	HON. W. S. BONNIFIELD.
FIFTH DISTRICT	HON. D. C. MCKENNEY.
SIXTH DISTRICT	HON. HENRY RIVES.
SEVENTH DISTRICT.....	HON. J. H. FLACK.

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RULES

OF THE

BOARD OF PARDONS.

1. The regular meetings of the board shall be held on the second Monday of January, April, July and October of each year.

2. Special meetings may be called by the Governor at any time when the exigencies of any case demand it, notice thereof being given to each member of the board.

3. No application for the remission of a fine or forfeiture, or for a commutation of sentence or pardon, shall be considered by the board unless presented in the form and manner required by the law of the State, "approved February 20, 1875."

4. In every case where the applicant has been confined in the State prison, he or she must procure a written certificate of his or her conduct during such confinement, from the warden of said prison, and file the same with the secretary of this board, on or before the day of hearing.

5. All oral testimony offered upon the hearing of any case must be presented under oath, unless otherwise directed by a majority of the board.

6. Action by the board upon every case shall be in private, unless otherwise ordered by the consent of all the members present.

7. After a case has once been acted upon and the relief asked for has been refused, it shall not, within twelve months thereafter, be again taken up or considered upon

any of the grounds specified in the original application, except by the consent of all the members of the board; nor in any case except upon new and regular notice as required by law in case of original application.

8. In voting upon any application the roll of members shall be called by the secretary of the board, in the following order:

First. The Attorney-general.

Second. The Junior Associate Justice of the Supreme Court.

Third. The Senior Associate Justice.

Fourth. The Chief Justice.

Fifth. The Governor.

Each member, when his name is called, shall declare his vote "for" or "against" the remission of the fine or forfeiture, commutation of sentence, pardon or restoration of citizenship.

RULES
OF
THE SUPREME COURT
OF THE STATE OF NEVADA.

RULE I.

1. Applicants for license to practice as attorneys and counselors will be examined in open court on the first day of the term.

2. The Supreme Court, upon application of the district judge of any judicial district, will appoint a committee to examine persons applying for admission to practice as attorneys and counselors at law. Such committee will consist of the district judge and at least two attorneys resident of the district.

The examination by the committee so appointed shall be conducted and certified according to the following rules:

The applicants shall be examined by the district judge and at least two others of the committee, and the questions and answers must be reduced to writing.

No intimation of the questions to be asked must be given to the applicant by any member of the committee previous to the examination.

The examination shall embrace the following subjects:

1. The history of this State and of the United States;
2. The constitutional relations of the State and Federal governments;
3. The jurisdiction of the various courts of this State and of the United States;
4. The various sources of our municipal law;
5. The general principles of the common law relating to property and personal rights and obligations;

6. The general grounds of equity jurisdiction and principles of equity jurisprudence;
7. Rules and principles of pleadings and evidence;
8. Practice under the civil and criminal codes of Nevada;
9. Remedies in hypothetical cases;
10. The course and duration of the applicant's studies.

3. The examiners will not be expected to go very much at large into the details of these subjects, but only sufficiently so, fairly to test the extent of the applicant's knowledge and the accuracy of his understanding of those subjects and books which he has studied.

4. When the examination is completed and reduced to writing, the examiners will return it to this court, accompanied by their certificate showing whether or not the applicant is of good moral character and has attained his majority, and is a *bona fide* resident of this State, such certificate shall also contain the facts that the applicant was examined in the presence of the committee; that he had no knowledge or intimation of the nature of any of the questions to be propounded to him before the same were asked by the committee, and that the answers to each and all the questions were taken down as given by the applicant without reference to any books or other outside aid.

5. The fee for license must in all cases be deposited with the clerk of the court before the application is made, to be returned to the applicant in case of rejection.

RULE II.

In all cases where an appeal has been perfected, and the statement settled (if there be one) thirty days before the commencement of a term, the transcript of the record shall be filed on or before the first day of such term.

RULE III.

1. If the transcript of the record be not filed within the time prescribed by Rule II, the appeal may be dismissed on motion during the first week of the term, without notice. A cause so dismissed may be restored during the same term, upon good cause shown, on notice to the opposite party; and unless so restored the dismissal shall be final, and a bar to any other appeal from the same order or judgment.

2. On such motion, there shall be presented the certificate of the clerk below, under the seal of the court, certifying the amount or character of the judgment; the date of its rendition; the fact and date of the filing of the notice of appeal, together with the fact and date of service thereof on the adverse party, and the character of the evidence by which said service appears; the fact and date of the filing the undertaking on appeal, and that the same is in due form; the fact and time of the settlement of the statement, if there be one; and also, that the appellant has received a duly certified transcript, or that he has not requested the clerk to certify to a correct transcript of the record; or, if he has made such request, that he has not paid the fees therefor, if the same have been demanded.

RULE IV.

1. All transcripts of record in civil cases shall be printed on unruled white writing paper, ten inches long by seven inches wide, with a margin, on the outer edge, of not less than two inches wide. The printed page, exclusive of any marginal note or reference, shall be seven inches long and three and one half inches wide. The folios, embracing ten lines each, shall be numbered from the commencement to the end, and the numbering of the folio shall be printed on the left margin of the page. Small pica solid is the smallest letter and most compact mode of composition allowed.

2. Transcripts in criminal cases may be printed in like manner as prescribed for civil cases; or, if not printed, shall be written on one side only of transcript paper, sixteen inches long by ten and one half inches in width, with a margin of not less than one and one half inches wide, fastened or bound together on the left sides of the pages by ribbon or tape, so that the same may be secured, and every part conveniently read. The transcript, if written, shall be in a fair, legible hand, and each paper or order shall be separately inserted.

3. The pleadings, proceedings and statement shall be chronologically arranged in the transcript, and each transcript shall be prefaced with an alphabetical index, specifying the folio of each separate paper, order or proceeding,

and of the testimony of each witness; and the transcript shall have at least one blank fly-sheet cover.

4. No record which fails to conform to these rules shall be received or filed by the clerk of the court.

RULE V.

The written transcript in civil causes, together with sufficient funds to pay for the printing of the same, may be transmitted to the clerk of this court. The clerk, upon the receipt thereof, shall file the same and cause the transcript to be printed, and to a printed copy shall annex his certificate that the said printed transcript is a full and correct copy of the transcript furnished to him by the party; and said certificate shall be *prima facie* evidence that the same is correct. The said printed copy so certified shall also be filed, and constitute the record of the cause in this court, subject to be corrected by reference to the written transcript on file.

RULE VI.

The expense of printing transcripts on appeal in civil causes and pleadings, affidavits, briefs or other papers constituting the record in original proceedings upon which the case is heard in this court, required by these rules to be printed, shall be allowed as costs, and taxed in bills of cost in the usual mode.

RULE VII.

For the purpose of correcting any error or defect in the transcript from the court below, either party may suggest the same, in writing, to this court, and upon good cause shown, obtain an order that the proper clerk certify to the whole or part of the record, as may be required, or may produce the same duly certified, without such order. If the attorney of the adverse party be absent, or the fact of the alleged error or defect be disputed, the suggestion, except when a certified copy is produced at the time, must be accompanied by an affidavit showing the existence of the error or defect alleged.

RULE VIII.

Exceptions or objections to the transcript, statement, the undertaking on appeal, notice of appeal, or to its service or

proof of service, or any technical exception or objection to the record affecting the right of the appellant to be heard on the points of error assigned, which might be cured on suggestion of diminution of the record, must be taken at the first term after the transcript is filed, and must be noted in the written or the printed points of the respondent, and filed at least one day before the argument, or they will not be regarded.

RULE IX.

Upon the death or other disability of a party pending an appeal, his representative shall be substituted in the suit by suggestion in writing to the court on the part of such representative, or any party on the record. Upon the entry of such suggestion, an order of substitution shall be made and the cause shall proceed as in other cases.

RULE X.

1. The calendar of each term shall consist only of those causes in which the transcript shall have been filed on or before the first day of the term, unless by written consent of the parties; *provided*, that all civil cases in which the appeal is perfected, and the statement settled, as provided in Rule II, and the transcript is not filed before the first day of the term, may be placed on the calendar, on motion of the respondent, upon the filing of the transcript.

2. When the transcript in a criminal cause is filed, after the calendar is made up, the cause may be placed thereon at any time, on motion of the defendant.

3. Causes shall be placed on the calendar in the order in which the transcripts are filed with the clerk.

RULE XI.

1. At least six days before the argument, the appellant shall furnish to the respondent a printed copy of his points and authorities, and within two days thereafter the respondent shall furnish to the appellant a written or printed copy of his points and authorities.

2. On or before the calling of the cause for argument each party shall file with the clerk his printed points and authorities, together with a brief statement of such of the facts as are necessary to explain the points made.

3. The oral argument may, in the discretion of the court, be limited to the printed points and authorities filed, and a failure by either party to file points and authorities under the provisions of this rule, shall be deemed a waiver by such party of the right to orally argue the cause.

4. No more than two counsel on a side will be heard upon the oral argument, except by special permission of the court, but each defendant who has appeared separately in the court below, may be heard through his own counsel.

5. At the argument, the court may order printed briefs to be filed by counsel for the respective parties within such time as may then be fixed.

6. In criminal cases it is left optional with counsel either to file written or printed points and authorities or briefs.

RULE XII.

In all cases where a paper or document is required by these rules to be printed, it shall be printed upon similar paper, and in the same style and form (except the numbering of the folios in the margin), as is prescribed for the printing of transcripts.

RULE XIII.

Besides the original, there shall be filed ten copies of the transcript, briefs and points and authorities, which copies shall be distributed by the clerk.

RULE XIV.

All opinions delivered by the court, after having been finally corrected, shall be recorded by the clerk.

RULE XV.

All motions for a rehearing shall be upon petition in writing, and presented within ten days after the final judgment is rendered, or order made by the court, and publication of its opinion and decision, and no argument will be heard thereon. No remittitur or mandate to the court below shall be issued until the expiration of the ten days herein provided, and decisions upon the petition, except on special order.

RULE XVI.

Where a judgment is reversed or modified, a certified copy of the opinion in the case shall be transmitted, with the remittitur, to the court below.

RULE XVII.

No paper shall be taken from the court room or clerk's office, except by order of the court, or of one of the justices. No order will be made for leave to withdraw a transcript for examination, except upon written consent to be filed with the clerk.

RULE XVIII.

No writ of error or *certiorari* shall be issued, except upon order of the court, upon petition, showing a proper cause for issuing the same.

RULE XIX.

Where a writ of error is issued, upon filing the same and a sufficient bond or undertaking with the clerk of the court below, and upon giving notice thereof to the opposite party or his attorney, and to the sheriff, it shall operate as a *supersedeas*. The bond or undertaking shall be substantially the same as required in cases on appeal.

RULE XX.

The writ of error shall be returnable within thirty days, unless otherwise specially directed.

RULE XXI.

The rules and practice of this court respecting appeals shall apply, so far as the same may be applicable, to proceedings upon a writ of error.

RULE XXII.

The writ shall not be allowed after the lapse of one year from the date of the judgment, order or decree which is sought to be reviewed, except under special circumstances.

RULE XXIII.

Appeals from orders granting or denying a change of venue, or any other interlocutory order made before trial, will be heard at any regular or adjourned term, upon three days' notice being given by either appellant or respondent, when the parties live within twenty miles of Carson. When the party served resides more than twenty miles from Carson, an additional day's notice will be required for each fifty miles, or fraction of fifty miles, from Carson.

RULE XXIV.

In all cases where notice of a motion is necessary, unless, for good cause shown, the time is shortened by an order of one of the justices, the notice shall be five days.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF NEVADA.
JANUARY TERM, 1879.

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[No. 892.]

**JULIA A. BLAISDELL ET AL., RESPONDENTS, v. HEISTER
STEPHENS ET AL., APPELLANTS.**

JOINT LIABILITY—WHEN DOES NOT EXIST.—Where two or more parties act each for himself, in producing a result injurious to plaintiff, they can not be held jointly liable for the acts of each other.

IDEM—INJUNCTION—EASEMENT—DRAINAGE.—The owner of upper land, who has for more than five years enjoyed the privilege of running the waste water used from artificial sources for the purpose of irrigating his land, does not acquire an easement to run the same over the lower lands in such unreasonable or unnatural quantities as to damage the property of such lower land-owners, and an injunction will issue to prevent such injury although the parties enjoined are not jointly liable for the damages.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts sufficiently appear in the opinion.

R. M. Clarke, for Appellants:

I. The defendants are in no sense joint wrong-doers. Their acts were several and distinct. There was no co-operation or concert of action between them. (2 Hilliard on

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Argument for Respondents.

Torts, p. 247, sec. 10; 19 Johnson, 381; 26 Pa. 482; 57 Id. 142.)

II. The right of drainage is an incident to the ownership of land and the defendants had the undoubted right to its exercise and enjoyment, so long as they allowed the water to take its natural course. (Angell on Water Courses, secs. 108 a, 108 c, 108 d; Washb. 306; 1 Beasley, 280.)

III. The right of easement and servitude for drainage may be acquired by prescription or adverse user; and as more than five years adverse user is shown, defendants' right is established. (*Earl v. De Hart*, 1 Beasley, 285; Angell, secs. 108 h, 108 j, 206 a, 372; 13 N. H. 467; 5 Metcalf, 253.)

IV. The defendants could not be sued for the injury which was occasioned by the waste water from the lands of other parties.

Thomas E. Haydon, for Respondents:

I. The only question in this case is one of law, whether the maxim, "*Sic utere tuo ut alienum non lœdas*," applies to this case.

II. A party has no right to use any more water than is sufficient to irrigate his own land. (*Barnes v. Sabron*, 10 Nev. 212.) The claim of prescriptive title can only be acquired by some beneficial use or purpose. (*Weaver v. Eureka Lake*, 15 Cal. 271; *McKinney v. Smith*, 21 Id. 374.) Defendants had no right or beneficial interest in the water after it passed their land, and plaintiffs acquired no prescriptive right to continue the use of such surplus water. (*Hanson v. McCue*, 42 Cal. 303.)

III. A ditch owner is responsible for any injury that is caused by want of due care in the construction or management of his ditch. (*Tenney v. Miners' Ditch Co.*, 7 Cal. 339; *Wolf v. St. Louis Water Co.*, 10 Id. 541; *Hoffman v. Tuolumne Water Co.*, 10 Id. 413; Angell on Water Courses, sec. 336; *Bailey v. Mayor of New York*, 3 Hill, 531. Leading Cases on Mines, Minerals, etc., 747, 748; S. & Red. on Negligence, secs. 576-81, and note 3; *Baird v. Williamson*, 15 C. B. (N. S.) 376; *Eastman v. Amoskeag Co.*, 44 N.

Opinion of the Court—Hawley, J.

H. 143; Hilliard on Remedies, 462-3, sec. 3 a, 4; 1 Hilliard on Torts (3 ed.), 606-608, secs. 16-18.)

IV. This is a suit in equity. (*Lake v. Tolles*, 8 Nev. 286; *Van Vliet v. Olin*, 4 Nev. 95; *Minturn v. Hayes*, 2 Cal. 590; *Smith v. Rowe*, 4 Id. 6; *Tuolumne Water Co. v. Chapman*, 8 Id. 392; *Goode v. Smith*, 13 Id. 84; *Koppikus v. Stat. Cap. Com.*, 16 Id. 248.)

V. The principle of "*Sic utere tuo ut alienum non lædas*" is applicable to ditch owners, but does not apply to ditches for irrigating purposes. (*Richardson v. Kier*, 34 Cal. 63; *Richardson v. Kier*, 37 Id. 263; *Gregory v. Nelson*, 41 Id. 278.)

Boardman & Varian, also for Respondents.

By the Court, HAWLEY, J.:

The plaintiffs, as owners of a drain ditch constructed in 1876, brought this action to recover damages against defendants for wrongfully flowing waste water from their lands to the injury of plaintiffs' ditch, and for an injunction to restrain such wrongful flowing of waste water. At the close of plaintiffs' testimony the defendants moved for a nonsuit upon the ground, among others, that it did not appear that the injury complained of "was the result of the joint or concurrent act of the defendants." This motion was overruled. The cause was tried before a jury to whom special issues were submitted. The jury answered the special issues, and also found a general verdict in favor of the plaintiffs, assessing the damages at fifty dollars. Both parties moved for judgment upon the special issues found by the jury. The court gave judgment in favor of the plaintiffs, and the defendants appeal.

From the issues found by the jury it appears that the "waste water from the defendants' lands and irrigating ditches" did flow into plaintiffs' drain ditch and that the waste water from the lands and irrigating ditches of Henry Weston and Mary Wall also flowed into plaintiffs' drain ditch. The waste water from the lands and ditches of the defendants has flowed upon the land drained and intersected by the drain ditch of plaintiffs ever since 1864.

Opinion of the Court—Hawley, J.

With the exception of the eighth day of May, 1877, no more waste or drainage water flowed from the lands and ditches of the defendants than in previous years. The defendants "own, occupy and irrigate separate and distinct tracts or parcels of land each in his own right." They have no drain ditch which they use together in common. The defendant Sessions in 1876 constructed a drain ditch leading from his land to the Truckee river of sufficient capacity to carry, and it did carry, all the waste water brought or used by him on his land with the exception of the eighth day of May, 1877.

The jury failed to find whether the defendants, or either of them, used any more water upon their land than was proper and necessary to irrigate the same, but did find that each defendant used proper and reasonable methods of irrigation. The plaintiff, Henry Stephens, had dams across the slough or channel, in which waste or surplus water from the lands of defendants' flowed, and turned the water out upon his lands to irrigate the same. The grantors of the plaintiff, Henry Stephens, appropriated, claimed and used the waste water flowing from the lands of defendants for irrigating purposes. The plaintiff, Pine, upon the land of the plaintiff, Blaisdell, used the waste or surplus water flowing from the lands of Henry Stephens, for irrigating purposes. The waste water flowing from the lands of defendants flowed upon the lands of the plaintiff, Henry Stephens, in a natural channel or slough, and he turned the water out of said channel upon his land. The waste water flowing from the lands of defendants, after passing over the lands of the plaintiff, Henry Stephens, flowed into an artificial ditch constructed upon the lands of the plaintiff, Blaisdell, and thence into the drain ditch of the plaintiffs. The plaintiffs' ditch was damaged to the extent of seventy-five dollars.

The jury did not know how much it was damaged by the water flowing from the lands of Mary Wall and Henry Weston, but found that it was damaged fifty dollars by the water flowing from the lands of defendants and twenty-

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five dollars by the “waste water flowing from plaintiffs’ lands.”

It does not appear from the evidence that the defendants acted in concert, or that the act of either in any manner produced the act of the other.

We are of opinion that the motion for a nonsuit ought to have been sustained.

The general principle is well settled that where two or more parties act, each for himself, in producing a result injurious to plaintiff, they can not be held jointly liable for the acts of each other. (*Ferguson v. Terry*, 1 B. Mon. 96; *Partenheimer v. Van Order*, 20 Barb. 479; *Guille v. Swan*, 19 Johns. 381; *Bard & Wenrich v. Yohn*, 26 Pa. St. 482; *Little Schuylkill Navigation Railroad and Coal Company v. Richards*, 57 Id. 142.)

The case last cited is certainly analogous to the case at bar. There the suit was brought for damages to a dam filled by deposits of coal dirt from different mines on the stream above the dam, and the plaintiffs sought to hold the defendant liable for the whole damages caused by the deposits. Speaking of the results that would follow if the defendant was held liable for the acts of others, the supreme court say: “It is immaterial what may be the nature of their several acts, or how small their share in the ultimate injury. If, instead of coal dirt, others were felling trees and suffering their tops and branches to float down the stream, finally finding a lodgment in the dam with the coal dirt, he who threw in the coal dirt and he who felled the trees would each be responsible for the acts of the other. In the same manner separate trespassers who should haul their rubbish upon a city lot, and throw it upon the same pile, would each be liable for the whole, if the final result be the only criterion of liability. But the fallacy lies in the assumption that the deposit of dirt by the stream in the basin is the foundation of liability. It is the immediate cause of the injury, but the ground of action is the negligent act above. The right of action arises upon the act of throwing the dirt into the stream—this is the tort, while the deposit below is only a consequence. The liability, therefore, began above

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with the defendant's act upon his own land, and this act was wholly separate and independent of all concert with others. His tort was several when it was committed, and it is difficult to see how it afterwards became joint, because its consequences united with other consequences. The union of consequences did not increase his injury. If the dirt were deposited mountain high by the stream, his dirt filled only its own space, and it was made neither more nor less by the accretions." In this case, the right of action arises, if at all, upon the act of allowing the waste water to run into the slough from the land of the defendants. This is the tort. The damage to the drain ditch below is only a consequence. The act of defendant, Sessions, in allowing the waste water to run from his land was separate and independent from the act of defendant, Stephens, in allowing the waste water to run from his land, and neither of them could be held liable in damages for the wrongful acts of the other.

The judgment of the district court is reversed and the cause remanded for a new trial.

RESPONSE TO PETITION FOR REHEARING.

By the Court, HAWLEY, J.:

A re-examination of all the testimony contained in the transcript strengthens the convictions expressed in the former opinion, that "it does not appear from the evidence that the defendants acted in concert, or that the act of either, in any manner, produced the act of the other." This being true, it follows, for the reasons stated in our former opinion, that the action at law can not be sustained as against both defendants. A rehearing was granted, principally upon the ground that—conceding the correctness of the views expressed in the opinion—it might not necessarily follow that the nonsuit should be granted as against both defendants. The plaintiffs might have the right to dismiss as to one of the parties and proceed against the other. This question, however, has not been relied upon by the respondents.

We are asked to decide the equitable rights of the re-

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spective parties, and determine whether or not, upon the facts disclosed in the record, the plaintiffs are entitled to an injunction.

The respondents admit, as the authorities declare, that the owner of an upper tract of land has an easement in the lower tracts to the extent of the natural flow of water from the upper to and upon the lower tract of land.

It is unnecessary to discuss the important, delicate and interesting questions that, under the improved methods of irrigation and improvement of agricultural lands, are liable to be raised as to the general right of the owner of an upper tract of land to flow the waste or surplus water used for irrigation from artificial means upon the lower lands of his neighbors. So far as the present case is concerned, it only presents the single question, whether the owner of the upper land, who has for more than five years enjoyed the undisturbed privilege of running the waste waters used from artificial sources for the purpose of irrigating his land, thereby acquires an easement by prescription to run the same over the lower lands in such unreasonable and unnatural quantities as to damage a drain ditch recently constructed by parties owning land below him, for the purpose of carrying off such surplus or waste water, as well as the waste water used in irrigating their own land.

The jury found, as stated in the former opinion, that, with the exception of the eighth of May, no more water flowed from defendants' lands than in previous years, and although they failed affirmatively "to find whether the defendants, or either of them, used any more water upon their land than was proper and necessary to irrigate the same," yet their other findings would seem to imply such to be the fact. But, be that as it may, the court, in its judgment and decree, did expressly find that, on the eighth of May, the defendants did allow an "inordinate quantity" to flow down over plaintiffs' lands. There is ample testimony to sustain this finding.

Under the decree the defendants are permitted to irrigate their lands by all reasonable use of the waters and by all convenient methods or systems of irrigation, and are only

Points decided.

bound to so regulate the enjoyment of this right "as not to materially injure the drain ditch of plaintiffs below their respective lands."

We are of opinion that upon the facts disclosed by the record the plaintiffs are certainly entitled to the injunction as decreed by the court. Upon a review of the questions involved in this case we are also of the opinion that respondents should be allowed, within fifteen days after the filing of the remittitur herein, if they so desire, to remit the judgment for damages, and if so remitted then the decree ordering an injunction should remain. Otherwise a new trial must be granted.

The judgment of the district court, in so far as it awards damages against the defendants, is reversed, and the cause remanded for such further proceedings as are indicated in this opinion would be proper.

The costs of this appeal to be taxed against respondents.

[No. 896.]

JAMES HUNTER & CO. ET AL., RESPONDENTS, v. TRUCKEE LODGE, No. 14, I. O. O. F. ET AL., APPELLANTS.

MOTION FOR NEW TRIAL—WAIVER OF NOTICE—TIME TO MOVE FOR NEW TRIAL.—Service of a statement on appeal is a waiver of written notice of the filing of findings of the court, and in such a case a notice of intention to move for a new trial must be filed within ten days after the service of statement. (*Corbett v. Swift*, 6 Nev. 194, affirmed.)

MECHANICS' LIEN LAW—LIBERALLY CONSTRUED.—The lien law is to be liberally construed. A substantial compliance with its provisions is all that is required. (*Skyrme v. Occidental M. & M. Co.*, 8 Nev. 219, affirmed.)

IDEM—TIME FOR FILING NOTICE.—The lien claimant is only required by the statute to file his notice before the expiration of thirty days after the completion of the building.

IDEM—FORECLOSURE—RIGHTS OF INTERVENORS.—Intervenors are connected with the proceeding to foreclose plaintiffs' lien, by force of the statute, when the action is commenced and notice thereof is published. The liens may be proved without any formal intervention.

IDEM—ALTERATION OF RECORD—DESCRIPTION OF PREMISES.—M. and D. filed a notice of lien and described the premises as being in lot 9 in a certain block. After the notice was recorded, but before the time had elapsed for filing, they were permitted to change the number of the lot in the

14 24
14 243
15 56
18 213
2* 50
18 208
3* 84

14 24
21 244
29*1091

Argument for Appellants.

notice and upon the record: *Held*, it appearing that no fraud was intended, and the notice otherwise containing a good description of the premises, that such alteration did not affect the validity of the notice.

PAYMENTS TO CONTRACTOR—MUST BE PLEADED BY DEFENDANT.—Before the defendant can avail himself of the fact, if it be a defense, that he had paid all that he agreed to pay, before notice of the claims of third parties, he must allege and prove the fact.

IDEM—NOT A DEFENSE—RIGHTS OF SUB-CONTRACTORS.—In construing the lien law (Stat. 1875, 122) the court, upon rehearing, *held*, that the legislature intended to give sub-contractors and material-men direct liens upon the premises for the value of their labor and materials, regardless of payments on the principal contract made prior to the time within which the law requires notice of their claims to be recorded.

CONSTRUCTION OF STATUTE ADOPTED FROM ANOTHER STATE—PRESUMPTION.—The rule that where a statute has received a judicial construction in another state, discussed: *Held*, that the decision of another state can not be presumed to be known to the legislature of this state, antecedent to its official publication.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts appear in the opinion.

Robert M. Clarke, for Appellants:

I. The alteration of Manning & Duck's notice was an unlawful act, Stat. 1871, 75, and could not confer any rights upon the claimants. It was a new notice and was never sworn to.

II. The liens were filed before the completion of the building. This was premature and unauthorized. (Stat. 1875, 122.)

III. Boyd & Courtois' notice of lien did not show that materials were used or furnished for the building. It should have been excluded. (*Houghton v. Blake*, 5 Cal. 240; *Bottomly v. Grace Church*, 2 Id. 90.)

IV. The lien claimants, other than plaintiff, did not comply with the law in bringing suits within six months. Their liens can not therefore bind the property. Commencing proceedings means commencing suits and issuing summons. (6 Nev. 290; 10 Cal. 240; 18 Ill. 318.) The filing of a petition for intervention is a superfluous act. (6 Nev. 291; 8 Id. 236; 14 Cal. 127.)

Argument for Appellants.

V. Our lien law was borrowed from California, Stat. Cal. 1867-8, 589, and unless the complaint shows that the owner of the building was indebted to the contractor when actual or constructive notice was given of his claim, it fails to state facts sufficient to constitute a cause of action. (49 Cal. 185; 51 Id. 423.)

VI. The presumption is that this law was adopted as interpreted by the supreme court of California. The question of actual knowledge or learning of the legislature is never considered when we seek to arrive at their intent in the construction of a law. Therefore, it is immaterial whether our legislature knew of the interpretation by the courts of California of the act in question previous to its adoption. If the rule shall prevail it must rest upon a legal presumption, whatever may be the reason for such presumption. The books lay down the rule in question, without any qualification as to the time of the construction or its publication. (Cooley Const. Law, 52; 2 Nev. 206; 5 Id. 24; 7 Id. 23; 8 Id. 320.) The highest tribunals of a country are presumed to have correctly understood their own laws, and having construed them, comity and prudence alike require the adopting state to take that construction as sound and correct. Hence results the duty of the law makers who adopt the law, if they desire to avoid the consequences of the rule, to provide in terms for an independent construction of the law. The true reason for the rule is found in the wants and necessities of the people of the state where a law is introduced. The law is passed because it is necessary. It takes effect immediately upon its passage. The wisest Solon is but an imperfect draughtsman of legislative enactments. To frame a perfect law upon any important subject, and one that will leave no room for construction, requires more skill, more wisdom and learning than is commonly attributed to our legislators. Most statutes are full of imperfections, yet the community must act upon them; men must regulate their most important concerns in conformity with them. In so doing, the law says they are entitled to have something whereby to guide their conduct. They have a right to rely upon rules of construction estab-

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lished by the law of the land. If this be the true reason of the rule, it follows that it can not be affected by the publication of the decision in authentic form previous to the enactment of the law.

Thomas E. Haydon, for Respondents:

I. Appellants waived their right to move for a new trial by not acting upon their actual notice of the decision of the court. (6 Nev. 195.)

II. The mechanics' lien law must be liberally construed. (9 Nev. 236; 11 Id. 277.)

III. The description in Manning & Duck's lien was sufficient, without the alteration. (*Dickson v. Corbett*, 11 Nev. 277.)

IV. There is nothing in the lien law which requires any notice to the owners or that limits their liability to the contract price. The owner must give notice to the subcontractors that he will not be liable for any materials furnished or labor done by them, otherwise he is bound. (*Fuquay v. Stickney*, 41 Cal. 583; 49 Id. 357; *Henry v. Tilson*, 17 Vt. 479.) The case of *Renton v. Conley*, 49 Cal. 185, is ill considered, illogical and absurd. It is true when one state adopts a statute of another state, it adopts also the *known construction* of such statute in the state from which it is borrowed. The language of the books generally, is that where a statute has a *known construction*, resulting from a *uniform series* of judicial expositions, then it is adopted by the state borrowing with the construction *well settled* in the state from which borrowed. (*Campbell v. Quinlin*, 3 Scam. 288.) But courts do not always follow this rule when unsatisfied with the reasoning of such decisions. (*Milliken v. Sloat*, 1 Nev. 580; *Van Doren v. Tjader*, 1 Id. 394; *Galland v. Lewis*, 26 Cal. 46.)

Boardman & Varian, and *W. L. Knox*, also, for Respondents:

By the Court, BEATTY, C. J.:

This is an action under the mechanics' lien law of 1875 (Stat. 1875, p. 122). The plaintiffs and intervenors were

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sub-contractors or material-men under Wood & Richards, the principal contractors for the erection of appellants' building. The judgment of the district court was in favor of the lien claimants, and the appeal is from the judgment and also from the order of the district court refusing a new trial.

The motion for a new trial, we think, was properly overruled upon the ground stated in the opinion of the district judge. The decree was entered October 13, 1876; on the eighteenth of October, appellant filed and served a statement on appeal, and its notice of intention to move for a new trial was not filed or served until more than ten days thereafter. On the principle decided in *Corbett v. Swift*, 6 Nev. 194, the service of the statement on appeal was a waiver of written notice of the filing of the findings of the court, and the notice of intention to move for a new trial not having been given within ten days thereafter was not in time. We shall therefore consider only those errors which are assigned in support of the appeal from the judgment.

1. The lien law provides, sec. 5, that every person claiming under it, except the original contractor, shall file a statement of his claim "within thirty days after the completion of the building." In this case all the notices of liens were filed before the completion of the building, and appellant claims that this was not a sufficient compliance with the law. We think it was. The law is to be liberally construed, and a substantial compliance with its provisions is all that is required. (*Skyrme v. Occidental Co.*, 8 Nev. 239.) The meaning of the statute, and all that it requires, is that the lien-claimant shall file his notice before the expiration of thirty days after the completion of the building, not that he must decide at his peril exactly when it is finished (a thing that it would often be impossible to do), and file his claim within the ensuing thirty days. There could have been no possible object in such a requirement, while the necessity of fixing a term within which liens of this character must be asserted is obvious. It may be true, as counsel contends, that a sub-contractor's claim is subordinate to that of the principal contractor, and that neither

can have any lien unless or until the building is completed. But if this were conceded it would not necessarily follow that a sub-contractor's notice of intention to claim a lien would be void if filed before his right was perfected by the completion of the principal contract. If both things are essential to his right of action it still makes no difference which is done first.

2. It is claimed that the intervenors in this case failed to commence proceedings in time. The statute provides, sec. 8, that no lien shall be binding for a longer period than six months after the same is filed "unless proceedings be commenced in a proper court within that time to enforce the same."

This action was commenced less than six months after the claims of intervenors were filed, and the plaintiffs caused the statutory notice to other claimants to be duly published. Each of the intervenors filed his petition of intervention in the case within six months after his claim was filed for record. But appellant contends that as these petitions were filed without the previous leave of the court they were wholly unauthorized, and consequently that the intervenors never connected themselves with the proceedings until the day of the trial, which was more than six months after their claims were recorded.

We think that, if it had been necessary for the intervenors to file petitions in order to connect themselves with the proceeding, they were authorized to do so without any order of court, for the statute gave them the absolute right to intervene. But we think the intervenors were connected with the proceeding by force of the statute from the moment the action was commenced and notice published by the plaintiffs. The action was a proceeding to enforce not only the lien of the plaintiffs but all the recorded liens. The holders of those liens not only had the right, but they were obliged to prove up their claims in this action, or be held to have waived them. This court has decided (*Elliott v. Ivers*, 6 Nev. 290), that in these cases a formal intervention is unnecessary, and that holders of recorded liens may prove them without having pleaded them, and such is the plain meaning of the

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statute. It was intimated, without being decided, by the supreme court of California (*Mars v. McKay*, 14 Cal. 129), that a lienholder would be barred of his right of action if he failed to file an intervention before the lapse of six months after filing his lien for record; but we fail to see any good reason for so holding. If the commencement of the first action and the publication of the statutory notice gives the court jurisdiction to determine all the recorded claims, and if the determination of that action bars all claims not presented, it would seem that the holders of all such claims are necessarily connected with the proceeding from the moment of its institution. This construction of the statute can lead to no possible inconvenience, and is in accord not only with its letter but its spirit, which is to afford a simple, inexpensive and summary process for the enforcement of mechanics' liens.

3. Manning & Duck's notice of lien, as originally filed and recorded, described the premises to be charged as lot 9 in a certain block in Reno. Before the time for filing notice of their claim had elapsed they discovered that the true description of the premises was a fraction of lot 10 in the same block. The recorder permitted them to change the description in the notice already filed, and made a corresponding change in the book where it was recorded. It is claimed that it was error to admit proof of this claim. What would be the effect of such an alteration if there was no other sufficient description of the premises, or if it was fraudulently intended, it is unnecessary to decide. It is sufficient for this case to say that it appears from the statement that no fraud was intended by Manning & Duck, and that their notice contained a good description of the premises without reference to the number of the lot. It described the building of the defendant situated on a certain block, and it was proved that defendant had but one building on that block, which was well known. The court found that this description was sufficient to identify the premises to be charged with the lien, and that is all the statute requires. (Sec. 5.)

4. Objection was made to the proof of Boyd & Courtois'

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claim on the ground that their petition of intervention did not aver that the materials supplied by them were actually used in the construction of the building of defendant. The objection was overruled, and this is assigned as error. We have already decided that no petitions of intervention were necessary. Boyd & Courtois had filed a sufficient notice of their claim, which showed among other things that the materials charged for had been used in the construction of defendants' building. Under that recorded notice they were entitled to prove their claim without any additional pleading.

Finally. It is contended that the district court erred in charging defendants' building with liens in favor of sub-contractors exceeding in amount the sum due to the original contractors when defendants first had notice of the claims of the sub-contractors.

It does not affirmatively appear from the record before us that less was due to the principal contractors than the amount of the liens; the pleadings, the findings of the court and the statement on appeal are silent upon this point. The complaint alleges that the original contract price of the building was nineteen thousand five hundred dollars—more than the aggregate amount of the liens—but fails to allege that any part thereof remained due at the time the liens were filed. There was no demurrer, and the answer is a mere general denial of the complaint without any affirmative allegations whatever. It will thus be seen that the proposition to be maintained by appellant under this assignment is that the judgment is erroneous, because it is not averred in the complaint that anything was due to the principal contractors when notice was given of the claims of the respondents. This involves a construction of the law and a question of pleading. In order to pronounce the judgment erroneous it must not only be held that under the law there can be no lien for an amount greater than is due from the owner of the building to the original contractor, but also that a complaint which fails to allege that anything was due when notice of the sub-contractor's claim was given is so fatally defective that it will not support a judgment in favor of the lien.

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The case of *Renton v. Conley*, 49 Cal. 187, which arose under a statute from which ours was substantially copied, seems to affirm both branches of the proposition, and the decision in that case was followed in *Wells v. Cahn*, 51 Cal. 423. We think these decisions go too far. Conceding their correctness as to the rights of lien claimants under the statute, it still does not follow that the rule of pleading is as they assume it to be. They give no reason for holding to so strict a rule, and they are professedly based upon earlier California decisions, which went only to the extent of holding that it was a good defense on the part of the owner of the building to show that he had paid the original contractor, in good faith and in pursuance of his contract, before receiving notice of the sub-contractor's claim. (See 13 Cal. 620; 16 Id. 126.) The doctrine of these cases is sufficiently vindicated by allowing to the owner of the building the advantage of his defense, when he himself pleads and proves it.

To hold that the plaintiff and intervenor must aver that he has not paid the original contractor, or that there is still due on the original contract an amount equal to the aggregate of their liens, would be inconsistent with the whole tenor of the law. For, as we have seen, an intervenor is not required to file any complaint or petition of intervention, the evident intention of the law being that his recorded claim shall serve the purpose of a complaint. If, then, a statement of his demand which comes up to the requirements of the statute makes out a *prima facie* case for a lienholder who intervenes in the action, there would seem to be no reason or consistency in requiring the lienholder who commences the action to allege something more. He could not, in any event, be required to make an allegation on the point in question more than sufficiently broad to cover his own claim, and then, if other liens were proved to a greater amount than he had alleged to be due on the original contract (as we have held they might be), the judgment would be open to the same objection which is urged in this case.

Our opinion is that it was the intention of the legisla-

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ture to give to material-men and sub-contractors, claiming liens under the law, the benefit of a presumption that contracts made with the original contractor were authorized by the owner of the premises, and, if under the statute, or under the constitution, it is a good defense for the owner to show that he has paid, in good faith and in pursuance of his contract, all that he agreed to pay, before notice of the claims of third parties, he is bound to allege and prove the fact.

The case of *Renton v. Conley*, *supra*, was decided a few months before our present lien law was passed, and the rule is invoked that when a statute of another state has received a construction before its adoption here, it is taken to have been adopted as construed. We think, however, the rule, even if it had been more strictly adhered to in this state, would scarcely be applicable in this instance; for the case in question, although decided, was not reported before the passage of our law, and it can not be presumed that the legislature was aware of the decision.

The judgment and order of the district court are affirmed.

RESPONSE TO PETITION FOR REHEARING.

By the Court, BEATTY, C. J.:

This case was originally submitted for decision without a very full or satisfactory argument of the main question involved in the last assignment of error discussed in our former opinion. On account of the important interests depending upon a correct solution of that question we felt unwilling to decide it without a fuller argument, and, believing that the appellant was not entitled under its answer to raise the point, we placed our decision upon that ground. But, a rehearing having been granted, the question alluded to has been thoroughly discussed, not only by counsel for the parties, but also by counsel interested in other cases, and we no longer have any motive to refrain from deciding it. We are not satisfied that the ground upon which we based the conclusion reached in our former opinion—the insufficiency of appellant's answer—is untenable; but since

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it is the earnest desire of all parties that the more important question as to the rights of sub-contractors and material-men should be settled by an authoritative construction of the lien law, and since our understanding of the statute leads us to the same conclusion to which we came before, there will be no occasion to revert to the question of pleading or practice.

The respondents are sub-contractors and material-men, and the law under which they claim (Stats. 1875, 122), is in all essential respects a copy of the California lien law of 1868. (Cal. Stats. 1867-8, 589.) The supreme court of that state, at the October term, 1874, decided that, under their statute, sub-contractors and material-men have no lien except to the extent that the owner of the building is indebted to the principal contractor at the time he receives notice of their claims. (*Renton v. Conley*, 49 Cal. 187.) After that decision was made, but before the publication of the volume of reports in which it appears, our legislature adopted the California statute, and upon the authority of *Renton v. Conley*, and another case in which it was followed (*Wells v. Cahn*, 51 Cal. 423), counsel for appellant claims that our statute must receive the same construction. He claims this upon the grounds: 1. That the California statute was correctly construed in those cases; and 2. That even if *Renton v. Conley* was erroneously decided, there is nevertheless a conclusive presumption that our legislature, in adopting the statute, intended it to mean what, in that case, it had been construed to mean.

If the second of these propositions is true, we shall have no occasion to consider the first; for our duty ends with ascertaining and giving effect to the intention of the legislature, and if there is indeed a conclusive presumption that the construction given to the law in *Renton v. Conley* was adopted along with the statute, it becomes a mere question of curiosity whether that case was correctly decided. We shall, therefore, inquire in the first place whether we are bound by that decision.

The rule of construction relied on by appellant is a familiar one, so familiar in fact that scarcely a volume of decisions

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of the younger states of the Union can be found in which it is not either expressly stated in terms more or less exact or tacitly assumed as the basis of decision. From this very frequency of allusion and statement, it has resulted that the rule and the principle upon which it rests have more than once been expressed in somewhat unguarded terms. But generally, if not always, such looseness of expression has been due to the fact that the circumstances of the particular case did not call for greater exactitude. The rule was neither misunderstood nor misapplied; and it was stated with sufficient precision for the case in hand, though in terms too unqualified for universal application.

As an example in illustration of this statement, we may cite what was said by this court in *McLane v. Abrams*, 2 Nev. 206: "It is a rule of construction, too familiar to require the citation of authorities, that where one state adopts the statute of another it is adopted with the construction placed upon it by the highest court of judicature of the state from which it is taken. The reason upon which this rule rests, gives it an importance and weight which should not be disregarded except upon the most urgent reasons. When the legislature of one state adopts the laws of another, it is presumed to know the construction placed upon those laws in the state from which they are adopted, and therefore that it adopts the construction with the law," etc.

Giving to this language its full and literal effect, and supposing it to be subject to no sort of qualification, it clearly sustains the position of appellant. It would follow that we should be absolutely bound by the decision of *Renton v. Conley*, even if it had been rendered but a day before and set aside the day after our statute was approved by the Governor. But nothing is better settled than that the language of every opinion is to be understood in a qualified sense—qualified, that is to say, by the facts of the case. It is a decision only upon those facts, and so far as it transcends them is merely *dictum*.

Now, in *McLane v. Abrams*, the court was considering a statute which had been copied from the laws of California *verbatim* nine years after it had been construed by the su-

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preme court of that state and seven years after the decision had been published in their official reports. In view of these facts the decision in that case lends no support to the position of appellant. It was, indeed, decided by implication that after the construction of a statute has been published for seven years the legislature of another state, adopting the statute, will be presumed to have known such construction. But even this was a question not mooted in the case, and it is clear that all the court intended to decide was that when there is reason to presume that a legislature in adopting the statute of another state knows the construction that has been put upon such statute by the highest courts of the state from which it is borrowed, that construction is presumed to have been adopted along with the statute. Stated in these terms there can be no objection to the rule, and undoubtedly it obtains in this state (see 1 Nev. 537; 2 Id. 206; 5 Id. 24; 7 Id. 27; 8 Id. 320), but subject to at least one important exception, viz: "When the language of a statute is so plain it will admit of but one construction, we can not give it another and absurd one because it has been so construed in another state." (1 Nev. 394.) This exception affords an indication of the limits within which the rule is of any validity. It is resorted to only as a means of discovering the intention of the legislature, and so far only as it conduces to that end is it allowed any force. If the language of a statute leaves no room for construction, its operation is excluded, and so, likewise, it can never be applied where the only reason upon which it rests totally fails.

In this view it becomes important to ascertain the origin and reason of the rule.

As to its origin it is undoubtedly a mere adaptation of the rule of construing statutes that were re-enacted after having been repealed, or after having expired by their own limitations or become obsolete. In such cases there was a natural and just presumption that the legislature was informed of any decision, however recent, of its own highest courts, giving a construction to the law proposed to be re-enacted, and there was a further and very cogent presump-

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tion that if it had wished to exclude such construction it would have made the necessary alteration in the terms of the law. Accordingly it has long been settled that when a state re-enacts one of its own laws, substantially in its original terms, the courts of that state will continue to construe the law after its re-enactment as they had construed it before. And they will do this not only because there are the best reasons for supposing that they are thereby conforming to the actual intent of the legislature, but because, so far as their former decision has become to any extent a rule of property, they are bound to adhere to it upon the principle of *stare decisis*.

When, however, a question arises as to the construction of a statute adopted from another state, it is clear that the decisions of that state construing the law derive no additional force from the doctrine of *stare decisis*. They are binding, if binding at all, only because they afford conclusive evidence of the actual intention of the legislature; and it is manifest that they can afford no such evidence unless there are good reasons for presuming them to have been actually known to the legislature when the law was adopted. This consideration is essential to a just appreciation of the rule, and a reference to the language of the earlier cases in which it was applied will show that at first it was constantly borne in mind. Those were cases in which statutes were to be construed that had been adopted in this country after having been in force in England for hundreds of years and their construction settled by long series of decisions.

Under such circumstances, it was eminently just to presume that their construction was known, and therefore adopted along with the statutes themselves.

In *Downey v. Hotchkiss*, it was held that the legislature of Connecticut, in adopting the English statute of frauds, also adopted its long-settled construction by the English courts. (2 Day, 225.) In *Kirkpatrick v. Gibson*, Chief Justice Marshall said: "I am the more inclined to that opinion because it is reasonable to suppose that where a British statute is re-enacted in this country we adopt the settled

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construction it has received, as well as the statute itself." (2 Brock. 391.) In *Pennock v. Dialogue*, Judge Story said: "It is doubtless true, as has been suggested at the bar, that where English statutes, such, for instance, as the statute of frauds and the statute of limitations, have been adopted into our own legislation, the known and settled construction of those statutes by courts of law has been considered as silently incorporated into the acts, or has been received with all the weight of authority." (2 Peters, 18.) In *Adams v. Field*, the supreme court of Vermont said: "When our statute of wills was enacted the statute of Charles II. had received a long, fixed and well-known construction, and when we adopt an English statute we take it with the construction which it had received, and this upon the ground that such was the implied intention of the legislature." (21 Vt. 266.) These cases and several others to the same effect are cited in *Commonwealth v. Hartnett*, 3 Gray, 451, where the principle of the rule is thus stated: "For if it were intended to exclude any known construction of a previous statute, the legal presumption is that its terms would be so changed as to effect that intention."

At a later period the principle established by these decisions was invoked in the construction of statutes borrowed by one state from another, and in the more recent cases a tendency may be observed to give a wider scope to the rule and to ignore the wholesome and necessary limitations under which it was first applied. This, however, is a tendency to be deprecated, and, so far as possible, avoided. It has probably resulted from the fact that the courts have found themselves unable to draw any definite line of distinction between such long-settled constructions as a legislature may reasonably be presumed to know and those more recent constructions to which no such presumption fairly attaches. It being once held that a legislature must be presumed to have known the long-settled construction of a statute adopted from another state, the rule thence deduced was naturally invoked in cases where the construction was more and more recent, and there being no means of fixing a limit of time within which it could be held that such pre-

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sumption would not arise, the operation of the rule has been gradually, and perhaps unavoidably, extended to cases in which it is more likely to have been misleading than otherwise.

But so far as we have observed no court has gone to the extent of holding that the decision of another state can be presumed to be known antecedent to its official publication; and we think that here at least a safe and practical and reasonable limit may be set to the operation of a rule already too much extended. We do not say that we should feel bound to conform to the decision of the highest court of another state merely because it was published in an official report before our adoption of a statute construed by it, but we do feel safe in holding that before such publication there ought to be no presumption that the decision was known to our legislature, and consequently that no inference of their intention can be drawn from any such presumption.

It is certainly true, as contended by counsel for appellant, that no case has been found in which this distinction has been recognized, but this is accounted for by the fact that no case has been found in which the facts warranted a decision based upon any such distinction. We are, however, sustained to this extent by the cases cited below. In frequent instances the courts have taken pains to show by comparison of dates and otherwise that it was reasonable to presume that the previous construction of borrowed statutes was actually known to the legislature by which they were adopted; and in one case, *Campbell v. Quinlin*, 3 Scam. 289, some stress was laid upon the fact that the decisions had not only been made but the "reports published to the world" prior to the adoption of the statute in question.

We think we are entirely justified, in view of all the cases, in qualifying the rule at least to the extent above stated. Nor do we anticipate that we shall thereby bring upon ourselves any of the inconveniences suggested by counsel. We are asked how we are to know when a decision is first published, and if we are not aware that they are frequently, if not always, published in the newspapers and in law magazines in advance of the official reports. Our answer is that

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the whole subject is one of judicial cognizance. Any application of the rule contended for presupposes judicial knowledge of the date when a decision was rendered, and it is as easy to know judicially when a decision was published in official form as to know when it was rendered, or that it was ever made. As to such ephemeral reports of cases as may be found in newspapers and magazines, it is safer to ignore them altogether than to presume that their contents are known to the legislature.

We refer to the following cases as bearing more or less directly upon the point above discussed: (See cases cited at page 52 of Cooley's Constitutional Limitations; also, *McKenzie v. State*, 11 Ark. 596; *Draper v. Emerson*, 22 Wis. 150; *Poertner v. Russell*, 33 Id. 193; *Harrison v. Sager*, 27 Mich. 478; *Greiner v. Klein*, 28 Id. 22; *State ex rel. M. and M. Railroad Company v. Macon county*, 41 Mo. 464; *Snoddy v. Cage*, 5 Texas, 108.)

Upon these authorities, and for the reasons above stated, we say as we said before, that there is no reason to presume that our legislature, when it adopted the California lien law, knew of the construction it had received in *Renton v. Conley*, and consequently it can not be presumed that the law was intended to mean what it was there held to mean, unless such intention is fairly deducible from the terms of the statute itself. We are thus brought back to appellant's first proposition, viz.: that the California statute of 1868, from which our statute of 1875 was copied, was correctly construed in *Renton v. Conley*.

We regret to say that after a most careful examination of the statute in question, as well as of the whole course of legislation and judicial construction in California on the subject of mechanics' liens antecedent to that decision, we are forced to the conviction that sub-contractors and material-men were thereby deprived of the rights which it was the intention of the legislature to give them.

In discussing the relation of owners of buildings to sub-contractors and others, Mr. Phillips, in his work on Mechanics' Liens says: "The protection of the sub-contractor and material-man, with a just regard to the rights of the owner

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of the property, has been a subject of much solicitude with most of the legislatures. Two systems seem principally to have been adopted. The one in Pennsylvania, which was the first, where the mechanic who did the work and the material-man who supplied the articles used, were deemed entitled to protection, rather than a mere builder or undertaker of contracts, made provision that the sub-contractor and material-man should have a lien for whatever sum might be due them directly on the building and land upon which it stood, and subordinating the lien of the contractor thereto. The other was the plan adopted in New York, which did not secure to any one except the original contractor an absolute lien on the property for the whole sum due, but by a species of equitable subrogation allowed the sub-contractor and material-man to give written notice to the owner of his unpaid claim, requiring the owner thereupon to retain such funds as were in his hands belonging to the contractor, to answer the suit of the sub-contractor and securing the same either by lien on the interest of the owner in the property, or a right of action against him—the payment of this sum to operate as a valid set-off against any demand of the contractor." (Sec. 57, p. 82.)

A comparison of the statutes and decisions of California on the subject of mechanics' liens gives us the impression that the legislature and supreme court of that state have most of the time since 1858 been acting at cross purposes. By various amendments to the statute the legislature has evinced an intention to establish the Pennsylvania system, but the law has been construed at every stage of its development into a mere embodiment of the New York system. The strong leaning of the court in favor of the latter system has been the result of what is probably an enlightened view of the true policy of legislation on this subject; for it seems that the plan of conferring on sub-contractors and material-men a right of lien for all sums which may be due them, irrespective of payments already made by the owner to the contractor, is passing out of favor, and that the tendency in the later legislation in the various states of the union is to confine their right to what may be

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owing by the owners at the time of notice to him of their claims. (Phillips on Mechanics' Liens, sec. 57.)

But although it may be true that the supreme court of California has at all times had a more just conception than the legislature of what the law ought to be, we can not help thinking that their lively appreciation of the injustice to which owners of buildings might be subjected under the Pennsylvania system has biased their judgment in the construction of the acts of the legislature.

By the first section of the act of 1856 (Cal. Stats. 1856, p. 203), it was enacted that: "All artisans, builders, mechanics, lumber merchants, and all other persons performing labor or furnishing materials for the construction of any building, wharf, or superstructure, shall have a lien on such building, wharf or superstructure for the work and labor done or material furnished by each respectively."

This section by itself would seem to give to sub-contractors, etc., a direct and absolute lien on the building for the amounts due them; but the provisions of section 3 were perhaps sufficient to justify the supreme court in holding that it was not the design of the legislature to make the owner responsible except upon notice, or to a greater extent than the sum due to the contractor at the date of the notice. (See *Knowles v. Joost*, 13 Cal. 621.) Section 3 of the act of 1856 was as follows: "On being served with a notice by a sub-contractor as provided in the last preceding section, the owner of such building, wharf or superstructure shall withhold from the contractor out of the first money due, or to become due to him under the contract, a sufficient sum to cover the lien claimed by such sub-contractor, journeyman or other persons performing labor or furnishing materials, until the validity thereof shall be ascertained by a proper legal proceeding if the same be contested; and if so established the amount thereof shall be a valid offset," etc.

But in 1858 this section was amended so as to read as follows: "Every sub-contractor, journeyman, * * * shall, under the provisions of this act, have a valid lien upon the building, wharf or superstructure on which such labor was performed, or for which such materials were furnished, re-

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gardless of the claims of the contractor against the owner of such building, etc.; but if any money be due or is to become due under the contract from said owner to said contractor, on being served with notice by a sub-contractor, as provided in the last preceding section, said owner may withhold, out of the first money due, or to become due, under the contract, a sufficient sum to cover the lien," etc. (Stats. 1858, p. 225.)

To our minds this amendment to the statute clearly indicates the intention of the legislature to make the owner responsible to sub-contractors and material-men for the amount of their claims, notwithstanding previous payment to the contractor of the entire contract price, provided, of course, they complied with the requirements of section 2, as to claiming, recording and serving notice of their liens. The first part of the section is positive to that effect, and the latter part does not qualify it—it merely gives to the owner a means of protection *pro tanto*, in case any portion of the contract price is still due, or to become due.

But, notwithstanding the pointed and stringent terms of this amendment, it was held in *McAlpin v. Duncan*, 16 Cal. 126, that it gave no additional rights to sub-contractors and material-men. The effect of the decision being that the law was left by the amendment exactly as it was before; or, in other words, that the legislature had taken the pains to amend the law without any intention of changing it. The only argument by which it was attempted to support this conclusion was an enumeration of the grave inconveniences which it was supposed would ensue if the language of the statute should be allowed its natural and obvious effect. This sort of argument is never very conclusive, and its force in this instance is greatly impaired by the fact that several of the states, for the sake of giving more complete protection to mechanics, laborers, etc., have long been contented to endure all the mischiefs involved in what Mr. Phillips calls the Pennsylvania system.

But it is not with the law of 1858, or the case of *McAlpin v. Duncan*, that we are particularly concerned. In 1862 the legislature of California repealed all existing laws on

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the subject of mechanics' liens, and passed a new act embodying the New York system and containing specific and ample provisions for giving it full effect. Under that law a number of cases arose in which it was held that all liens were subordinate to the original contract; that the owner could never be compelled to pay more than he had expressly contracted to pay; that if he paid the original contractor according to the terms of his original contract before notice of the claims of sub-contractors, etc., he was absolved to the extent of the payment so made. It is upon these decisions that appellant chiefly relies in its petition for a rehearing. They are, however, entirely inapplicable. No doubt they give a correct construction to the law of 1862 (Stats. 1862, p. 384), but that law bears scarcely a trace of resemblance to the act of 1868 (Stats. 1868, p. 589), by which it was repealed, and under which the case of *Renton v. Conley* arose. It seems to us scarcely possible to compare the two acts without being convinced that the intention of the latter was to make a radical change in the existing law and to give to sub-contractors, etc., direct liens for the amounts due them, regardless of the terms of the original contract or of the state of the account between the owner and contractor. It may be that such a law is arbitrary, unjust and impolitic, but the intention of the legislature to so frame it is to our minds clear. This is proved by the fact that although it was modeled upon the law of 1858, it was by no means a mere copy of that law. Various additions and alterations were made, all clearly tending to one purpose, and all evincing the desire of the legislature to obviate the construction placed upon the old law in *McAlpin v. Duncan*, and other cases.

For instance, it was enacted in the first section that every mechanic, artisan, lumber merchant, etc., should have a lien for his labor or materials "whether furnished at the instance of the owner of the building or other improvement or his agent," and for the purposes of the act "every contractor, sub-contractor, architect, builder or other person having charge" of the work or improvement was declared to be the agent of the owner.

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Again, by section 4 it was enacted that land upon which any improvement was made without the consent or authority of the owner, should be subject to liens for the cost of the improvement, unless the owner, within three days after being informed of the commencement of the improvement, should post a written notice on the premises that he would not be responsible. Still more significant are the provisions of section 11, which gives to the owner the right to recover back from the contractor any amount which he may be compelled by lienholders to pay "in excess of the contract price."

In all these strongly marked features the law of 1868 differed from that of 1858, and it is a significant circumstance that they were all left out of the code, which was prepared by the code commissioners and adopted by the legislature in 1872. Those commissioners undertook to provide (Code of Civil Procedure, sec. 1183), that the aggregate amount of liens should never exceed what "the owner would be otherwise liable to pay," and it is evident they thought it necessary to strike out the provisions above referred to in order to make the code consistent with itself. It is to be presumed this portion of the code was unwittingly adopted by the legislature, for at its next session, in 1874, the amendments of the code commissioners were stricken out and the law of 1868 re-enacted. (See 2 Hittell's Codes and Statutes, secs. 11, 183, 11, 192, 11, 193.)

After all this industrious changing of the law, *Renton v. Conley* was decided upon the assumption that it remained exactly what it had been before. In this view we are unable to coincide. On the contrary, we think the language of the statute, without reference to the significant circumstances under which it was amended and re-amended in California, leaves no room for doubt that the legislature intended to give sub-contractors and material-men direct liens upon the premises for the value of their labor and materials, regardless of payments on the principal contract made prior to the time within which the law requires notice of their claims to be recorded. In support of this conclusion, we refer to *Colter v. Freese et al.*, 45 Ind. 97, in which most of the cases

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involving the point under discussion are carefully reviewed. Thus, and upon broader grounds, we again conclude that the judgment and order appealed from should be affirmed. It is so ordered.

HAWLEY, J., concurring:

I concur in the judgment of affirmance upon the ground that appellant, having failed in its answer to allege that there was not anything due to the principal contractors at the time of receiving proper notice of the claim of the subcontractors, is not in a position to raise the material question discussed in the opinion of the chief justice, as to the proper construction of the statute.

[No. 952.]

THE STATE OF NEVADA EX REL. W. W. HOBART,
RELATOR, v. RICHARD RYLAND, TREASURER OF EUREKA
COUNTY, RESPONDENT.

MILITIA ROLL—EXPENSES OF, HOW PAID.—In construing the provisions of the statute: *Held*, that the bills of county assessors for making the militia roll must be passed upon by the state board of military auditors and paid out of the militia fund of the state.

APPLICATION for Mandamus.

The facts are stated in the opinion.

Robert M. Clarke, for Relator.

Bishop & Sabin and *C. N. Harris*, for Respondent.

By the Court, LEONARD J.:

The relator, as state controller, filed his petition in this court, praying for the issuance of an alternative writ of mandamus requiring respondent to show cause why he had failed to pay into the state treasury the sum of one hundred and forty four dollars alleged to be due to the state, and that upon the hearing respondent be peremptorily commanded to pay said sum into the state treasury.

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Respondent appeared, and in justification of his action in the premises, stated the following facts in his answer: That in the year 1877, one H. Knight was assessor of Eureka county, and as such officer, as required by law, he prepared and made out a list or roll of all persons in the county subject to military duty in said year; that thereafter said Knight duly presented to the board of county commissioners of the county his bill for services in making said military list or roll, for allowance; that on the first day of April, 1878, the board duly allowed said bill in the sum of four hundred dollars; that the same was thereafter duly approved and allowed by the county auditor of the county for the sum of four hundred dollars; that the portion of said bill to be paid by the county of Eureka was two hundred and fifty-six dollars, and the portion by the state was one hundred and forty-four dollars, as fixed by law; that on the first day of April, 1878, the said county auditor drew his warrant upon respondent for the sum of two hundred and fifty-six dollars, directing the payment of said sum to said Knight, for and on account of the portion of said bill due and payable from Eureka county, which sum respondent, as such treasurer, then and there paid from the funds of said county, then in his hands; that said county auditor then and there issued and delivered to respondent, as such treasurer, a voucher against the state of Nevada for the sum of one hundred and forty-four dollars, the same being the amount due from the state to said Knight, on account of his said services; that in the first semi-annual settlement for the year 1878 with the state, respondent returned said voucher for one hundred and forty-four dollars to the relator as state controller, as a legal and just charge and demand against the state; that relator wrongfully refused to allow said voucher in said semi-annual settlement as a lawful charge against the state.

Relator demurred to respondent's answer, on the ground that it did not state facts sufficient to constitute a defense; that it appeared from the answer that it was the duty of the respondent to pay over the said sum of money mentioned in the petition.

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Section 3200, Compiled Laws, provides in substance that when an allowance is made to any assessor or auditor, as in the revenue law provided, the clerk of the board of county commissioners shall certify the account allowed, to the auditor, who shall draw his warrant on the county treasurer for that part of the same which the county is required to pay, which shall be in proportion to the taxes levied for state and county purposes respectively; and the auditor shall make a certified copy of the account and indorse thereon the amount due from the state, * * * and shall furnish such copy, with its indorsements, to the county treasurer, who shall pay out of the moneys belonging to the state and county respectively the amounts indorsed on such accounts to the assessor and auditor, and take his receipt therefor thereon. See also section 3210.

As we understand, the board of commissioners, auditor and treasurer, acted under the sections of the revenue law last referred to, in relation to the claim of Knight for preparing the military roll, and the principal question before us, is, whether or not those sections which provide for the payment of claims of assessors for services rendered in assessing property also apply to claims of such officers in preparing the military roll. In our opinion they do not.

Under "An Act to provide for Organizing and Disciplining the Militia of the State," approved March 4, 1865 (Comp. Laws, 3641, 3642), it is made the duty of the county assessor of each revenue district or county, when he prepares a roll containing the taxable inhabitants of his county, to enroll all the inhabitants thereof subject to military duty, which list or roll shall be sworn to. * * * "And the compensation allowed for making out said military list shall be the same, or be determined and fixed in the same manner, as for making out the assessment list." No compensation is allowed for making an "assessment list" by the assessor, but section 3136 makes it his duty to prepare a *tax list or assessment roll*, in which book shall be listed all the property of the county subject to taxation. The preparation of such tax list or assessment roll is a necessary part of a valid assessment of property, and the time properly

occupied in making the same is to be included in the number of days for which he is allowed a per diem of ten dollars, under section 3209. We have no doubt that when the legislature used the words "assessment list" in section 3642 of the militia law, the same was intended as in the use of the words "tax list or assessment roll" in section 3136 of the revenue law. Such being the case, it would seem that the assessor is really entitled to receive from some source the sum of ten dollars per day for the time necessarily required and occupied in making out a military list or roll. The revenue law, however, neither requires the making of a military list or roll by the assessor, nor provides for payment of the expenses of the same. The militia law does both. But the provision of section 3642 of the militia law, that "the compensation allowed for making out said military list shall be the same, or be determined and fixed in the same manner as for making out the assessment list," simply fixes the amount of the compensation allowed. It does not determine the manner of payment, whether by the state and county together or by either alone. The words, "or be determined and fixed in the same manner" were intended to be explanatory of the remainder of the sentence quoted, so that the assessor's aggregate compensation for making out the military roll should not in any case exceed ten dollars per day. For instance, had not those words been inserted, assessors might, perhaps, have claimed the same aggregate compensation for making out the military roll as they were allowed for making out the assessment roll, although the number of days employed upon the latter were more than those occupied upon the former. At least, had it not been for the explanatory words there would have been some room for conflict of opinion. Their meaning can not be as claimed by respondent, that is, that the assessor's bill for making out the military roll should be passed upon by the board of county commissioners and be paid by the state and county, in proportion to the taxes levied for state and county purposes respectively. In the first place, it was not the intention of the legislature, as appears from the whole statute, that any portion of the expenses incident to enrolling, organ-

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izing or sustaining a state militia should be borne by any county *per se*, but that the state at large should bear the same. The object of the law in enrolling the inhabitants of Eureka county subject to military duty was not for the protection of that county alone, but for the whole state. "In case of war, insurrection or rebellion, or of resistance to the execution of the laws of this state, * * * the commander-in-chief is authorized to call into active service any portion of the organized or enrolled militia of the state." (Comp. Laws, 3663.) The organized and enrolled militia of Eureka county may be called to do duty in Storey county, and *vice versa*. Under such circumstances, it was proper and equitable for the legislature to require the state to bear the burden entailed by the enactment of the militia law, and we have no doubt that such was the intention of the legislature. But in addition to the reason and evident spirit of the law, sections 3677, 3678, 3679 and 3680 provide that the commander-in-chief, the adjutant-general and state controller shall constitute a state board of military auditors; that such board shall have a seal, an impression of which shall be attached to all orders drawn upon the general or military fund; that no money shall be paid out of such fund by the state treasurer upon the order of such board except by order thereof, with the seal attached, and that such order shall specify upon its face the objects for which such money is paid and to whom; that it shall be the duty of said board to audit and pay all reasonable expenses incurred by volunteer companies in the service of this state and officers attached to the same, and all other claims required under the provisions of this act." * * *

A claim for the enrollment of the inhabitants of a county subject to military duty is as much a claim "required under the provisions" of the militia act as any other claim could be.

The required enrollment is the very foundation of the organization of the state militia, and the bills for the same must be passed upon by the military auditors instead of the county commissioners of any county. If no appropriation has been made for the payment of such claims, the legisla-

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ture can come to the rescue of assessors, but county commissioners and treasurers can not, nor can courts.

In our opinion the voucher presented by respondent to relator did not excuse the former from payment of the sum of one hundred and forty-four dollars into the state treasury, and the demurrer must be sustained. Such being our view of this case, the writ of mandamus must issue commanding respondent forthwith to pay said sum of one hundred and forty-four dollars into the state treasury, as required by law.

It is so ordered.

[No. 942.]

GIOVANNI ESCERE, RESPONDENT, v. JOHN TORRE,
APPELLANT.

APPEAL TAKEN FOR DELAY—DAMAGES.—Where an appeal is taken merely for delay, damages will be awarded equal to ten per cent. of the judgment. (*Wheeler v. Floral M. & M. Co.*, 10 Nev. 200, affirmed.)

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The facts appear in the opinion.

C. J. Lansing and *D. E. Baily*, for appellant.

Laspeyre & Beatty, for Respondent.

By the Court, BEATTY, C. J.:

This case was submitted by stipulation upon briefs to be filed. The time within which the appellant was to file his brief has long since elapsed, and he has failed to present anything in support of his appeal. The respondent now moves that the judgment be affirmed, and suggesting that the appeal was taken merely for delay, asks that he be awarded damages at the rate of two per cent. a month on the amount of his judgment, for the time execution has been stayed by the appeal in accordance with the rule announced in *Wheeler v. Floral M. & M. Co.*, 10 Nev. 200.

We think the motion should be granted. No error is

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assigned in support of the appeal from the judgment. The appeal from the order denying a new trial is without any pretense of merit. The only ground of the motion was insufficiency of the evidence to warrant the verdict, but the statement clearly shows that if the evidence of the plaintiff was true the verdict was correct. On a direct conflict of evidence the finding of the jury and the decision of the court was for the plaintiff, and there is nothing upon which it can be pretended the judgment or order appealed from could be reversed. It is manifest that the appeal was taken for delay merely, and it has had the effect of staying execution for a period of six months.

The judgment is affirmed with twelve per cent. damages in addition to costs and accruing interest.

[No. 900.]

**TOWN OF GOLD HILL, APPELLANT, v. ALEXANDER
BRISACHER, RESPONDENT.**

VIOLATION OF TOWN ORDINANCE—CRIMINAL CAUSE—JURISDICTION.—The trial of a party charged with violation of a town ordinance is a criminal case. The charge does not amount to a felony, and this court has no jurisdiction in such a case.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts appear in the opinion.

J. H. Harris, Town Attorney, and R. H. Taylor, for Appellant.

William Woodburn, for Respondent.

By the Court, BEATTY, C. J.:

The defendant was convicted in a justice's court of violating an ordinance of Gold Hill and adjudged to pay a fine and to be imprisoned in default of payment. He appealed to the district court of Storey county, where a judgment was rendered in his favor. From that judgment this ap-

Statement of Facts.

peal is taken. The defendant moves to dismiss the appeal on the ground that the supreme court has no jurisdiction in cases of this character. The motion must prevail. This is not a "case at law" involving the legality of a municipal fine. We decided in *State v. Rising*, 10 Nev. 103, that the expressions "all cases at law" and "all criminal cases," as used in the constitution, were intended to designate distinct categories, mutually exclusive. This is clearly a criminal case, and can not, therefore, be one of the "cases at law" in which this court has appellate jurisdiction; and since the offense charged does not amount to a felony, we have no jurisdiction of it as a criminal case. (Constitution, art. VI., sec. 4.)

The appeal is dismissed.

[No. 925.]

THE ORR WATER DITCH COMPANY, APPELLANT, v.
JOHN LARCOMBE, ET AL., RESPONDENTS.

BILL OF INTERPLEADER—WHAT CONSTITUTES.—In a bill of interpleader it must be shown that two or more persons have a claim against the plaintiff; that they claim the same property; that the plaintiff has no beneficial interest in the property and can not safely determine to which of the defendants it belongs.

BILL IN THE NATURE OF AN INTERPLEADER.—Is distinguished from a bill of interpleader proper in this that the complainant may seek some relief against the respective claimants to the property.

JUDGMENT ON PLEADINGS—WHEN ERRONEOUS.—In construing the pleadings: *Held*, that the court erred in rendering a decree in favor of defendant, Larcombe, for one hundred inches of water, without allowing the plaintiffs to introduce evidence, if it could, that Larcombe was not entitled to any more than thirty-five inches.

IDEM.—Where one of the defendants answered and disclaimed having any interest in the property: *Held*, that the court erred in rendering a judgment, upon the pleadings, in his favor for costs. Plaintiff had the right to show, if it could, that his disclaimer was untrue.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The material averments of the complaint are as follows: That in 1871 Alonzo Dodge agreed with the defendant, John

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Larcombe, one James Sullivan, Patrick Kelly, George Snively, T. P. Myers and Daniel Powell, to construct a water ditch from the Truckee river, about three and a half miles above the town of Reno down to the lands of said parties; that in order to construct said ditch, said Alonzo Dodge agreed to purchase from Henry Orr, a certain small ditch then owned by him, which he used for the purpose of conducting water to his land, and which was on the route contemplated by said Alonzo Dodge for his aforesaid ditch, agreeing to give said Orr in consideration thereof sufficient water to irrigate his land; that Alonzo Dodge agreed to have his ditch completed on or about the first day of April, A. D. 1872; that on the eighth day of November, A. D. 1871, and before the said completion thereof by him, Alonzo Dodge executed to John Larcombe a deed of grant, bargain and sale of one hundred inches of water in said ditch, to be thereafter conducted therein, and afterwards executed similar deeds to the other parties to said agreement; that Alonzo Dodge failed to complete the ditch according to his contract, and on the fifth day of March, 1872, he was released therefrom, and said Larcombe, Powell, Snively, Myers and Alonzo Dodge entered into an agreement with Henry Orr, as in said complaint set forth, for him to construct said ditch on the terms therein specified; that Henry Orr did duly construct said ditch according to his said agreement, all members except John Larcombe paying for the expenses thereof; that on the seventeenth day of March, A. D. 1873, Henry Orr conveyed his right, title and interest in his first mentioned small ditch to said Powell, Snively, Myers and Dodge, who thereafter, on the twentieth day of March, A. D. 1873, located the same in accordance with the laws of the State of Nevada, said Daniel Powell owning ten shares, and Snively, Myers and Alonzo Dodge seven shares each; that on the twenty-ninth day of March, 1875, Alonzo Dodge conveyed by deed, in consideration of seven hundred dollars, his seven shares in said ditch to Henry Orr, and then ceased to have any further or other interest therein; that at this date the seven shares being the interest of Alonzo Dodge, did not exceed thirty-five inches of water; that on the

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twentieth day of December, A. D. 1875, said Powell, Orr, and James Gooch, Eugene Gooch, D. C. Bryant and Robert Frazer, grantees of G. W. Snively and T. P. Myers, formed an incorporation under the name of the Orr Water Ditch Company, plaintiffs, and said John Larcombe is not a member thereof; that since the first day of May, A. D., 1874, John Larcombe has used and appropriated one hundred inches of the water of said ditch, claiming the same by virtue of his deed of grant, bargain and sale of November 8, 1871, from Alonzo Dodge; that since said twenty-ninth day of March, A. D., 1875, Henry Orr claims to be the owner of all the water that said Alonzo Dodge had conveyed to him by his deed of that date, and uses the same for irrigating purposes on his land; that plaintiffs do not know to whom to give this water of Alonzo Dodge, and from whom to withhold the same, and therefore bring this action against both these parties, in order to have a final adjudication, binding upon all parties to this controversy.

To this complaint the said defendant John Larcombe demurred and afterward answered, claiming the right to use one hundred inches of water from said ditch by virtue of his aforesaid deed, dated November 8, 1871, from Alonzo Dodge. A default was entered against defendant Orr on the seventh of November, 1877.

On the twenty-third day of January, 1878, Henry Orr moved the court to set aside his default and allow him to answer, which request and motion was denied by the court. He subsequently filed an answer disclaiming any interest in the property.

At the trial, defendant John Larcombe introduced testimony to show that he was the owner of and entitled to the use of one hundred inches of water in said ditch, and rested his case.

Plaintiff offered to prove that the defendants, John Larcombe and Henry Orr, were not entitled to more than thirty-five inches of water, as stated in the complaint, by reason of any title derived from said Alonzo Dodge. This testimony was objected to. The court sustained this objection, on the ground that the only parties who could be heard

Argument for Appellant.

were the two defendants, John Larcombe and Henry Orr, and that the plaintiff could not be heard in opposition to John Larcombe's claim of one hundred inches of water, but that they were estopped from proving that he was not entitled to that amount of water; to all of which ruling the plaintiffs then and there duly excepted. A decree was rendered and duly entered in favor of John Larcombe for one hundred inches of water, and in favor of the defendant Orr for his costs.

William Cain, for Appellant:

I. Bills in the nature of an interpleader are eminently the subject of a court of equity. (Story Eq. Pl., sec. 297 b; 2 Story Eq. Jur., secs. 822, 824; *Bedell v. Hoffman*, 2 Paige Ch. 199; *Mohawk & H. R. R. v. Clute*, 4 Id. 388, 392; *Dorn v. Fox*, 61 N. Y. 264.)

II. There does not appear to be any settled practice in cases of this character. (*City Bank v. Bangs*, 2 Paige Ch. 571; 2 Story Eq. Jur., sec. 822; *Condict v. King*, 13 N. J. Eq. 375; U. S. Digest, 606.)

III. In this action the plaintiffs allege that thirty-five inches of water are the property of one or the other of the defendants. It may be that by his default the defendant Henry Orr admits he has no claim thereto, and hence that defendant, John Larcombe, is the owner thereof and entitled to a decree for that amount of water from plaintiffs' ditch, and is a tenant in common with them to that extent. (*Badeau v. Rogers & Lecord*, 2 Paige Ch. 210; *Richard v. Saller*, 6 Johns. Ch. 445; *Cogswell v. Armstrong*, 77 Ill. 139; *Aymer v. Gault*, 2 Paige, 283.) But when the defendant Larcombe claims more water than is admitted by plaintiffs to be due to either of the parties defendants, to wit, one hundred inches, then the plaintiff ought clearly to be heard as to this excess of sixty-five inches. (*City Bank v. Bangs*, 2 Paige, 570.)

IV. The court also erred in refusing the plaintiff a decree against defendant Henry Orr for the thirty-five inches of water decreed to the said defendant John Larcombe. (*Badeau v. Rogers*, 2 Paige Ch. 210.)

Robert M. Clarke, also for Appellant.

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Boardman & Varian, for Respondent Larcombe.

There is a difficulty in the way of plaintiff which its appeal can not overcome. The complaint shows that there was and could be no dispute as to the legal title of the one hundred inches claimed by Larcombe, between Orr and Larcombe. By deed of date, November 8, 1871, Dodge conveys one hundred inches to Larcombe. Whatever interest Dodge had at this date passed to and vested in Larcombe under his deed, by virtue of the statute. The subsequent location of the ditch, under the acts of 1866 and 1869, gave the locators, Powell, Snively, Meyers and Dodge, no additional rights to the water. (*Barnes v. Sabron*, 10 Nev. 232.) Consequently Dodge's deed to Orr of March 29, 1875, conveyed no interest, because Dodge had no interest to convey.

Thomas E. Haydon, for Respondent Orr.

By the Court, HAWLEY, J.:

A bill of interpleader proper lies only where two or more persons claim the same debt or duty from the complainant. In the language of the court in *Dorn v. Fox*: "In a strict bill of interpleader the following ingredients are necessary: 1. Two or more persons must have preferred a claim against the plaintiff. 2. They must claim the same thing, whether it be a debt or duty. 3. The plaintiff must have no beneficial interest in the thing claimed. 4. It must appear that he can not determine without hazard to himself, to which of the defendants the thing, of right, belongs." (61 N. Y. 268; *Hathaway v. Foy*, 40 Mo. 540; *Cady v. Potter*, 55 Barb. 463; *Long v. Barker*, 85 Ill. 432.)

Applying these rules to plaintiff's complaint, it is apparent that it can not be treated as a bill of interpleader. It is somewhat difficult to determine the real character of the complaint. It is, to say the least, very carelessly drawn. It seems to have been the intention of plaintiff's counsel to prepare a bill of interpleader; but as soon as objections are made to it as such, he admits its insufficiency and then

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claims that he is entitled to have it sustained as a bill in the nature of an interpleader.

One of the distinguishing features in bills in the nature of an interpleader seems to be that the complainant may seek some relief against the respective claimants to the property. In order to maintain a bill in the nature of an interpleader, where the plaintiff is entitled to equitable relief against the owner of the property, it must also appear that the legal title thereto is in dispute between two or more persons, and that plaintiff can not ascertain to which of said parties it actually belongs. (*The Mohawk and Hudson River Railroad Co. v. Clute*, 4 Paige Ch. 385; 2 Story's Eq. Jur., sec. 824.)

The complaint in this action can not be treated as a bill in the nature of an interpleader. From the facts alleged it may be that the plaintiff could sustain a separate and independent cause of action against both of the defendants; but there is nothing in the case, as stated, which would authorize the plaintiff to compel the defendants to litigate their respective rights to the property in question in this proceeding.

It may be that the court did not err in overruling the special demurrer interposed upon the ground that the complaint was ambiguous, uncertain and unintelligible, because the real objections to the pleadings were not therein particularly specified; but, be that as it may, it is evident that the court, in treating the complaint as a bill of interpleader, did err in rendering a decree in favor of the defendant Larcombe upon the pleadings and testimony, without allowing the plaintiff to introduce evidence, as requested, to show, if it could, that the defendant Larcombe was not entitled in any event to a decree for more than thirty-five inches of water. If the complaint, in terms, admitted that the defendant Larcombe was entitled to one hundred inches of water, as claimed by his counsel, then it did not state facts sufficient to constitute a cause of action, and the suit ought for that reason to have been dismissed. But the complaint, when read entire, does not expressly admit that Larcombe is entitled to one hundred inches of water by virtue of his

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interest in the ditch derived by the deed from Alonzo Dodge, executed on the eighth day of November, 1871, but, on the other hand, it alleges that by reason of the failure of Alonzo Dodge to complete the ditch, and by reason of its completion by Henry Orr, under the agreement of March 5, 1872, the said Larcombe was entitled, if at all, to only thirty-five inches of water.

The complaint is ambiguous, indefinite and uncertain in this, that it does not state what portion of the ditch was completed under the original contract with Alonzo Dodge and what portion thereof was constructed by Henry Orr under the second agreement. It is inconsistent in this, that although it alleges that the plaintiff is ignorant of the respective rights of the defendants, and hence is unable to determine which of said parties is entitled to the interest of Alonzo Dodge in said ditch, it sets forth with minuteness of detail all the facts upon which each of the defendants rely to substantiate their respective claims.

Treating the complaint as a bill of interpleader the court also erred in rendering a judgment in favor of the defendant Orr for his costs. Admitting that it was not erroneous to allow the defendant Orr to answer after his default had been entered, and that his answer or disclaimer shows that he had no interest in the questions involved at the time of filing his answer, yet the plaintiff would have had the right to show, if it could, that his disclaimer was untrue, and that at the time of the commencement of the action, the defendant Orr did claim the certificates of stock referred to, and by virtue thereof did claim an interest in the property as alleged in the complaint.

We are not called upon by this appeal to intimate any opinion as to the respective rights of the defendant Larcombe under the deed from Alonzo Dodge, bearing date November 8, 1871, and of the other parties claiming an interest in the ditch under and by virtue of the deed executed on the twenty-ninth day of March, A. D. 1875, by Alonzo Dodge to Henry Orr. For the errors indicated the judgment must be reversed and the cause remanded. It may be that under our liberal form of pleading, the plaintiff might be able to

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amend its present complaint so as to allege facts sufficient to constitute a cause of action against the defendant Larcombe.

The judgment of the district court is reversed, and the cause remanded with instructions to the district court to dismiss the suit unless the complainant moves to amend its complaint so as to show a cause of action against the defendant Larcombe.

[No. 934.]

P. PARONI, RESPONDENT, v. W. F. ELLISON ET AL.,
APPELLANTS. *

CONSTRUCTION OF DEED—SUFFICIENCY OF DESCRIPTION.—Where a deed described the property as “that certain piece or parcel of timber land lying and being about forty-five miles, northerly direction, from the town of Eureka, * * * and the said timber land being known as McLeod Wood Ranch, and containing about five hundred acres more or less:” *Held*, that the deed sufficiently describes the property by name.

EJECTMENT—POSSESSION OF PURCHASER PRIOR TO DEED.—In an action of ejectment it is admissible for plaintiff to introduce evidence that he took possession of the property after his agreement to purchase and before he received a deed, and to state what his acts of possession were.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The testimony relative to the question of actual possession by the plaintiff and his grantor is briefly and substantially as follows: McLeod located the land in dispute on the sixteenth day of February, 1876, and marked the lines with brush fence and blazed trees. At the time of his location there had been no appropriation of the land. He erected a cabin and put men at work upon the ranch chopping wood. On the seventh day of September, 1877, he sold the ranch to plaintiff and J. J. Maggaroli, and put them in possession of the property. Maggaroli remained in possession, and plaintiff and McLeod went to Eureka, where the deed was executed by McLeod and delivered to plaintiff, on the fifteenth of September.

On the seventeenth of the same month plaintiff learned

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that defendants had taken possession of the ranch. Prior to that date he had sent some men to the ranch to cut wood.

A. M. Hillhouse, for Appellants:

I. The deed from McLeod to Paroni is void for uncertainty and does not embrace the premises in dispute. When a natural object, such as a creek, is called for in a conveyance, it is conclusive over mere courses, distances or names. (*Holmes v. Trout*, 7 Peters, 217; *McIver's Lessee v. Walker*, 9 Cranch, 173; *Newson v. Pryor*, 7 Wheat. 7; *Blake v. Dougherty*, 5 Id. 362; *Walsh v. Hill*, 38 Cal. 481; *Colton v. Seavey*, 22 Id. 496; *De Arguello v. Green*, 26 Id. 615.) No extrinsic evidence is ever permitted which in any way contradicts the terms of the conveyance. (*Altschul v. S. F. C. P. H. A.*, 43 Cal. 173; *Pierson v. McCahill*, 21 Id. 122; *Richardson v. Scott River Co.*, 22 Id. 150; *Lennard v. Vischer*, 2 Id. 37; *Clark v. Lancaster*, 36 Md. 196; 1 Wharton's Law of Evidence, sec. 1050; *Stanley v. Green*, 12 Cal. 148.)

II. The description in this deed is so uncertain as to render it void. (*Fenwick v. Floyd*, 1 Har. & Gills R. 172; *McLaughlin v. Bishop*, 35 N. J. L. 512.)

III. If the deed is good, then there is not sufficient proof of occupation by the grantor of plaintiff to sustain the findings and judgment. (*Hutton v. Schumaker*, 21 Cal. 453; *Polack v. McGrath*, 32 Id. 20; *Brumagin v. Bradshaw*, 39 Id. 44; 12 Nev. 66; 11 Id. 171; 9 Id. 20; 4 Id. 59.)

IV. The court erred in admitting evidence that the plaintiff, after the ouster by defendants, was proceeding to get men to work upon the premises. (*Sowder, etc. v. McMillian's Heirs*, 4 Dana, 456; 4 Nev. 59.) The court erred in holding and deciding that plaintiff at the time of the entry of defendants, was proceeding with diligence to complete his occupation of the premises, because there is no proof that plaintiff had done anything prior to the alleged ouster to which any subsequent act could by relation attach. Besides all the alleged sale of these premises prior to the fifteenth of September, 1877, was parol and incompetent. (1 Comp. Laws, sec. 283, p. 87; 3 Nev. 507.)

Opinion of the Court—Hawley, J.

George W. Baker and John T. Baker, for Respondent:

I. It is essential to the validity of a conveyance that the property conveyed should be so described as to be capable of identification; but it is not essential that the deed should itself contain such a description without the aid of extrinsic evidence. (3 Cal. 59; 12 Id. 148; 44 Id. 253.) The defendants did not connect themselves with the title of plaintiff's grantors but were mere intruders. (*Walsh v. Hill*, 38 Cal. 482.

II. The acts of the plaintiff showed sufficient possession of the land in dispute.

III. The possession and occupation by Paroni was sufficient to hold the land independent of the deed. (2 Nev. 280; 4 Id. 68; 15 Cal. 27; 25 Id. 122; 43 Id. 574; 44 Id. 246; 45 Id. 280, 597.)

By the Court, HAWLEY, J.:

This is an action of ejectment to recover a certain tract of land situated in Eureka county. The plaintiff obtained judgment and the defendants appeal.

1. It is claimed that the deed from McLeod to Paroni is void for uncertainty of description and that the description does not embrace the premises in dispute. The description in the deed is as follows: "That certain piece or parcel of timber land lying and being about forty-five miles, northerly direction, from the town of Eureka, * * * and the said timber land being known as McLeod wood ranch and containing about five hundred acres more or less." The description in the complaint is as follows: "That certain wood and timber ranch situated in said county of Eureka, Nevada, about ten miles from Alpha station, on the Eureka and Palisade railroad" (here follows a description by metes and bounds) "and containing about seven hundred and twenty-six acres of land and being the ranch known as the McLeod & McFail ranch." The rule is well settled that any defect or uncertainty which may exist in the description given in a deed does not render the deed void if that event can be avoided by construction. The deed in question sufficiently

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describes the property by name. (*Stanley v. Green*, 12 Cal. 148; *Haley v. Armstrong*, 44 Id. 138.) Such a description can always be rendered certain by extrinsic evidence, and the testimony, which was properly admitted, clearly shows that the property in dispute is the same that was intended to be conveyed by the deed. It was the only wood ranch owned by McLeod in the locality designated. The testimony did not, in any manner, contradict the description given in the deed. The court did not err in admitting the deed in evidence against the objections urged by appellant.

2. The acts of Paroni in taking possession of the property after the purchase of the same from McLeod, and prior to the execution and delivery of the deed, were properly admitted in evidence. The testimony shows that the defendants did not enter upon the land until the fifteenth day of September, 1877, the day of the execution and delivery of the deed. The testimony of Paroni, that he and a hired man went out to the ranch on the seventeenth day of September, and that when the hired men went to work they were ordered off by the defendants, only tended to establish the fact of ouster, and was certainly admissible for that purpose.

3. The evidence upon the question of actual possession by the plaintiff and his grantor is, in our opinion, sufficient to sustain the findings and judgment of the court.

The judgment of the district court is affirmed.

[No. 850.]

LOUIS SOLOMON ET AL., RESPONDENTS, v. M. FULLER
ET AL., APPELLANTS.

NEW TRIAL—WHEN SHOULD NOT BE GRANTED.—A new trial ought not to be granted on a motion to set aside a verdict, merely because the court had erred in finding a fact in some preliminary proceeding in the case.

AMENDMENT OF JUDGMENT AFTER ADJOURNMENT OF TERM.—The court has no power to amend a judgment after the adjournment of the term unless there is something in the record to amend by.

APPEAL from the District Court of the Seventh Judicial District, Lincoln County.

The facts sufficiently appear in the opinion.

George S. Sawyer, for Appellants:

I. The errors appearing in the judgment-roll necessitate a reversal. The court could not proceed after the death of Cardenas without repairing the breach caused by his death.

II. The court erred in amending the judgment after the term had expired at which it was rendered, upon its own motion, and when there was nothing in the record to amend by. (3 Cal. 255; 9 Id. 172; 19 Id. 227; 25 Id. 79; 27 Id. 791; 33 Id. 780.)

III. The amendment changed the parties plaintiff to the action, and ought not to have been allowed. (2 Tillinghast & Shearman Practice, 1076; 1 Van Santvoord's Pleadings, 806; 14 N. Y. 506; 9 Nev. 317; 49 Cal. 306; 4 Nev. 42; 3 Cal. 235.)

Wells & Stewart, of counsel for Appellants.

A. B. Hunt, and *Bishop & Sabin*, for Respondents:

I. The court had full power to amend the judgment in the manner in which it did. (*Leviston v. Swan*, 33 Cal. 480.)

II. The action of the court in substituting D. L. Deal as party plaintiff was right and proper, Deal being the public administrator. (1 Comp. Laws, 1079; *Judson v. Love*, 35 Cal. 463; *Shartzler v. Love*, 40 Id. 96; *Taylor v. W. P. R. R. Co.*, 45 Id. 337.)

III. If the order of the court below in directing the judgment to run in the name of L. Solomon, surviving partner, etc., was error, it was one which could not in any manner prejudice the appellant. No reversal will be had for error which does not prejudice. (*Robinson v. Imp. S. Mg. Co.*, 5 Nev. 44; *Todman v. Purdy*, 5 Id. 238; *Cahill v. Hirschman*, 6 Id. 57; *Caples v. C. P. R. R. Co.*, 6 Id. 265; *Conley v. Chedic*, 7 Id. 336.)

By the Court, BEATTY, C. J.:

There were appeals in this case from the judgment, from an order amending the judgment and from the order de-

Opinion of the Court—Beatty, C. J.

nying a new trial. At a former term motions to dismiss the appeals and to strike out the statement on motion for a new trial were submitted. We ordered the statement stricken out and the appeal from the judgment to be dismissed, but overruled the motion to dismiss the appeals from the orders. Those appeals have now been argued and submitted.

It appears that after the commencement of the action Cardenas, one of the plaintiffs, died. The fact having been suggested to the court, an order was made substituting D. L. Deal, public administrator of Lincoln county, as the personal representative of Cardenas. Thereupon the trial of the case proceeded, and plaintiffs obtained a verdict and judgment. Defendants moved for a new trial; the motion was overruled, and at the same time the court, of its own motion, ordered the judgment to be so amended as to run in favor of Louis Solomon, surviving partner of Cardenas. These are the orders appealed from.

The order denying a new trial must be affirmed. After striking out the statement (see former opinion, 13 Nev. 276), there is nothing left to sustain the motion except the affidavits in relation to newly-discovered evidence, and they, unaided by the statement, fail to show that the evidence so discovered is material to any of the issues raised by the pleadings. It would seem to have been intended to impeach some statements made by the plaintiff Solomon as a witness; but the record in the state in which it is left fails to show that Solomon gave any testimony in the case.

One of the affidavits tends to show that the court erred in finding the fact that Deal was the administrator of Cardenas. But the finding of the court as to that fact, and the verdict of the jury upon the issues submitted to them, are totally distinct, and an affidavit which tends to show that the court erred in its finding does not support a motion to set aside the verdict of the jury, which was the motion that was made. It is unnecessary in this case to decide whether the findings of the court, upon which the order of substitution was based, were the subject of a motion for a new trial. If they were, the motion should have specified those

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findings; and this case is disposed of by saying that the motion of appellants was directed exclusively to the verdict.

It may perhaps be true that the effect of setting aside the order of substitution would have been to render a new trial necessary; but, however that may be, we are satisfied that an order for a new trial ought not to be made on a motion to set aside a verdict, merely because the court has erred in finding a fact in some preliminary proceeding in the case. The error of the court in such case can not be reviewed on that sort of a motion.

But the order of the court amending the judgment we think was erroneous. It was made long after the expiration of the term at which the judgment was rendered, and there was nothing in the record to show that Solomon and Cardenas were partners. This order of the court is therefore reversed, and the judgment, as originally entered, affirmed.

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 [No. 928.]

**THE STATE OF NEVADA EX REL. H. H. BECK ET AL.,
RELATORS, *v.* THE BOARD OF COUNTY COM-
MISSIONERS OF WASHOE COUNTY ET AL.,
RESPONDENTS.**

CERTIORARI—WHEN WILL NOT BE ISSUED—CLAIMS AGAINST COUNTY.—A writ of certiorari will not be issued to review claims against a county which have been audited, allowed and paid.

IDEM—REMEDY AT LAW.—If the commissioners and auditor exceeded their jurisdiction in allowing and auditing the claims, their action would be null and void and the remedy would be by an action at law to recover back the money paid.

IDEM—WHEN WRIT WILL ISSUE—COUNTY COMMISSIONERS.—The power of county commissioners to allow accounts against a county is confined to those "legally chargeable," and a writ of certiorari will issue to review their action.

IDEM—TRANSCRIBING TESTIMONY FOR THE GOVERNOR.—It is the duty of the district judge to transmit the testimony in a capital case to the Governor. (1 Comp. Laws, 2088.) The statute does not authorize the clerk to perform any such duty or to make any charge therefor.

COSTS—TAXED AGAINST RESPONDENTS.—Where, after the issuance of the writ of certiorari, the county commissioners and county auditor canceled the claim to be reviewed: *Held*, there being nothing in the record to

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show that it was the intention of such officers before the writ was issued to cancel such claim, that the costs of the proceeding should be taxed against respondents.

APPLICATION for writ of certiorari.

The facts sufficiently appear in the opinion.

Boardman & Varian, for Relators:

I. The board of county commissioners has no authority conferred upon it to allow any claims not legally chargeable against the county. (2 Comp. Laws, 3077; *People v. Supervisors El Dorado Co.* 8 Cal. 59; *Id.* 11 Id. 174; *Linden v. Case*, 46 Id. 174; *El Dorado Co. v. Elstner*, 18 Id. 148; *Robinson v. Supervisors*, 16 Id. 208; *People ex rel. Merritt v. Lawrence*, 6 Hill, 244.)

II. The fees charged by the officers are not authorized by statute. In the absence of an express statute they are not legal charges. (*Bicknell v. Amador County*, 30 Cal. 238; *Kitchell v. Madison County*, 4 Scam. 165; 2 Black. 1, 365; Comp. Laws, 1832, 1995, 2004, 2015, 2016, 2075, 2080, 2084, 2162-4, 2191, 2299, 2300, 2740, 2745, 3075; *U. S. v. Waitz*, 3 Sawyer, 473.)

John Bowman, District Attorney, of Washoe County, also for Relators.

Wm. Cain, S. A. Mann and R. M. Clarke, for Respondents:

I. The writ of certiorari will not lie unless in a case where the act complained of is the exercise of "judicial functions," and not then if there be any other plain, speedy and adequate remedy. (Comp. Laws, 1497, 1503; *State v. Commissioners of Washoe County*, 5 Nev. 317; *Hetzel v. Commissioners Eureka County*, 8 Id. 362; *Birchfield v. Harris*, 9 Id. 382, 386; *Maxwell v. Rives*, 11 Id. 213; *Phillips v. Welch et al.*, 12 Id. 158.)

II. The board of commissioners are charged with the duty of acting on all unaudited demands against the county and allowing or rejecting the same. (Comp. Laws, 3078, 3093.) To put the functions of the board in action it is only necessary to have: 1. A meeting of the board; 2. An

Argument for Respondents.

unaudited demand against the county, presented within six months after due, properly authenticated. (Comp. Laws, 3093.) When such unaudited demand is presented the board must act—must allow or reject the demand: Comp. Laws, 3078, 3093; and, in case of refusal, *action* may be compelled by mandamus. (Comp. Laws, 1508; *People v. Superv. San Francisco*, 11 Cal. 42, 47; *Id.* 28 Id. 429, 431; *People v. Superv. Co. New York*, 21 How. Pr. 323; *People v. Superv. Courtland*, 24 Id. 119; *People v. Sexton*, 24 Cal. 79; *People v. Lake Co.* 33 Id. 487; 26 Ohio St. 364, 369; *Supervisors v. Briggs*, 2 Denio, 26.) Jurisdiction is power to hear and determine—to act concerning the matter involved. (6 Peters, 691, 709; 43 Cal. 365, 368; *Ex parte Winston*, 9 Nev. 71; *Phillips v. Welch*, 12 Id. 158.) The commissioners must of necessity determine what are and what are not accounts legally chargeable against the county, and such determination necessarily involves the exercise of jurisdiction. (*Hotchkiss v. Board of Supervisors*, 65 N. Y. 222, 226.)

III. The writ of certiorari will not be granted in any case where the injury is fully consummated, because: 1. It would be fruitless; 2. There is no one “beneficially interested.” (Comp. Laws, 1490; *People v. Mayor N. Y.*, 5 Barb. 43, 49; *Londonderry v. Peru*, 45 Vt. 429; *Furbush v. Cunningham*, 56 Me. 186; *People v. Tax Commissioners*, 43 Barb. 494; *People v. Commissioners of Highways*, 30 N. Y. 72; *Carroll v. Siebenthaler*, 37 Cal. 193, 196; *Andrews v. Pratt*, 44 Id. 309, 318.)

IV. The writ of certiorari will not lie in any case where there is any other plain, speedy and adequate remedy. (Comp. Laws, 1497; *People v. Board of Pilot Commissioners*, 37 Barb. 126; *People v. County Judge*, 40 Cal. 479; 44 Id. 309, 318.)

V. The writ should be denied, because the board not only had jurisdiction to act upon the claims in question, but the claims and all the items composing them were just and proper charges against the county. (Comp. Laws, 2737; 18 Johns. R. 242.)

Opinion of the Court—Hawley, J.

By the Court, HAWLEY, J.:

This is an application by ten taxpayers of Washoe county for a writ of certiorari to review the action of the board of county commissioners and county auditor of Washoe county in allowing and auditing certain claims in favor of P. B. Comstock, county clerk of said county. The claims amount in the aggregate to four thousand four hundred and twenty-seven dollars and forty cents.

In an amendment to the original petition it is, among other things, alleged: "That all of said claims," excepting the claim for three hundred and seventy-three dollars for transcribing the testimony in the case of *The State v. Rover*, to be forwarded to the governor's office, "have been heretofore, and prior to the filing of the original petition, audited and allowed, and warrants for the same on the county treasury of said county, drawn by * * * John B. Williams, auditor; * * * that each and every of said claims, and the warrants therefor, have been, prior to the filing of the original petition by the county treasurer of said county, out of the moneys thereof, paid to the said P. B. Comstock."

So far as these claims are concerned, relators are not entitled, in this proceeding, to have the same reviewed. They would not be benefited by a review of the action of the commissioners and auditor, even if their acts were declared null and void. Under the provisions of the statute the affidavit for the writ of certiorari must show that the party applying is beneficially interested. (Stats. 1869, sec. 437.)

The several claims having been allowed, audited and paid, it would be a useless ceremony in this proceeding to review the action of the commissioners and auditor. (*People v. Commissioners*, 43 Barb. 494.)

If, as alleged in the petition, the claims were not legally chargeable, and if, in allowing and auditing the same, the commissioners and auditor exceeded their jurisdiction (questions which we do not here decide), then their action was null and void. (*People v. Lawrence*, 6 Hill, 244; *People ex rel. Hotchkiss v. Supervisors*, 65 N. Y. 225; *Carroll v.*

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Siebenthaler, 37 Cal. 196; *Linden v. Case*, 46 Cal. 174; and the remedy would be by a suit at law, by the county against the clerk, to recover back the amount of money, if any, paid to Comstock without warrant of law. (*Board of Supervisors v. Ellis*, 59 N. Y. 620.) The petition shows that the account of three hundred and seventy-three dollars "has been * * * audited and allowed by the said auditor as a just and legal claim against the said county; but that no warrant has yet been drawn therefor and the same has not yet been paid." As to this particular claim the relators are beneficially interested.

The statute creating a board of county commissioners, and defining their duties, provides, among other things, that the "commissioners shall have power and jurisdiction in their respective counties * * * to examine, settle and allow all accounts legally chargeable against the county." (2 Comp. Laws, 3077.)

Prior to the adoption of this statute the supreme court of California decided, under a similar statute, that the power of the supervisors to allow accounts against the county is confined to those "legally chargeable," and that a writ of certiorari would lie to review the action of the board. (*People v. Supervisors of El Dorado County*, 8 Cal. 58; *Id.* 11 Cal. 170; *Robinson v. Board of Supervisors*, 16 Cal. 208.) The commissioners and auditor, in allowing and auditing the accounts, are limited to the powers conferred upon them by statute. (*People v. Lawrence*, 6 Hill, 244, and authorities before cited.) Their action in allowing and auditing the account in question is wholly indefensible. There is no law authorizing the clerk to perform any such duty or to make any such charge. The claim, upon its face, clearly shows that it was not legally chargeable against the county. The statute makes it the duty of the judge of the court to transmit the testimony taken at the trial to the governor. (1 Comp. Laws, 2080.)

There is no statute authorizing any charge to be made for transcribing the testimony so taken for the purpose of transmitting it to the governor. The demurrer to the petition, in so far as it applies to all the accounts which have been

Opinion of the Court—Hawley, J.

paid, is sustained; and in so far as it relates to the claim of three hundred and seventy-three dollars it is overruled.

The clerk will issue a writ of certiorari directed to the board of county commissioners of Washoe county and to the county auditor of said county commanding them to fully certify all the records and proceedings of said board and auditor relating to the said claim of three hundred and seventy-three dollars to this court on or before the third day of March, A. D. 1879.

OPINION upon return of writ of certiorari.

By the Court, HAWLEY, J.:

The return to the writ of certiorari, heretofore issued, shows that after the filing of the petition for the writ, by the relators, the board of county commissioners, on the application of P. B. Comstock, ordered that the claim of three hundred and seventy-three dollars, for transcribing the evidence in the *Rover case* for the governor's office, "be canceled of record by the auditor;" that the auditor, in pursuance of said order, "canceled said claim * * * on the claim book, and made the necessary entry in the books of the county." The only question, therefore, for us to consider is one of costs.

It satisfactorily appears, from the return to the writ, that it was not the intention of the board of county commissioners to ever have this claim paid; that by a verbal understanding between the commissioners and the auditor the claim was audited, in order "that it might be properly presented for payment to Humboldt county, and in case the said claim was not allowed and paid by Humboldt county that no warrant should be issued * * * on the treasurer of Washoe county for its payment." Upon this showing the respondents claim that the costs of this proceeding should not be taxed against them. There was nothing in the public records to show the intention of the officers in allowing and auditing this claim.

It does not appear, from the records before us, that the relators had any knowledge of such officers' intentions.

Statement of Facts.

They were authorized to act, and did act, upon the facts as shown by the records of Washoe county. The respondents in their brief, filed in support of their demurrer, claimed that the county commissioners and county auditor were authorized by law to allow and audit this particular account.

Under the circumstances of this case it is ordered that the writ be dismissed and that the costs of this proceeding be taxed against respondents.

[No. 937.]

THE STATE OF NEVADA, RESPONDENT, v. FRANK CLIFFORD, APPELLANT.

LARCENY—LOST PROPERTY FOUND IN THE HIGHWAY.—When property is found in the highway, and the finder knows the owner, or there are any marks upon it by which the owner may be ascertained, and the finder instead of restoring it converts it to his own use, such conversion will constitute a felonious taking.

IDEM—FELONIOUS INTENT.—If there be a felonious intent to appropriate the property coupled with a reasonable belief that the owner could be found, it would be larceny.

IDEM—SUBSEQUENT FELONIOUS INTENT NOT SUFFICIENT.—If the finder takes possession of the property without intending to steal it at the time of the original taking, he can not be found guilty of larceny by any subsequent intention to convert it to his own use.

POSSESSION OF STOLEN PROPERTY.—Where there is no other evidence tending to establish the guilt of the defendant except the fact of his having the possession of the property stolen, and the jury believe that the defendant gives a reasonable account of such possession, it would be their duty to acquit.

TESTIMONY—HELD SUFFICIENT TO SUSTAIN A CONVICTION FOR LARCENY.

APPEAL from the District Court of the Sixth Judicial District, White Pine County.

The facts of this case are substantially as follows: On the twenty-sixth day of February, 1878, there was upon the stage of Gilmer, Saulsbury & Co., five bars of bullion. Each bar was in a leather sack, used by Wells, Fargo & Co., for the shipment of bullion. The bars were numbered and marked "Christy Mill & Mining Co.," in plain letters. The sacks were also numbered and had a tag of Wells,

14 72
26 41

58 Ala 381

58 Ala 425

13 Minn 104

19 Ohio St 154

35 Ohio St 46

116 Mass 42

Statement of Facts.

Fargo & Co. upon them. The bars of bullion were all upon the stage when it left Prairies Ranch, and upon the arrival of the stage at Ward, in White Pine county, it was ascertained that one of the bars, marked No. 21, contained in sack No. 8, was missing. The agent of Wells, Fargo & Co. at Ward immediately notified the office in San Francisco, Cal., of the loss of the bullion. In due time posters from Wells, Fargo & Co. came back offering a reward of two hundred and fifty dollars for the recovery of the bullion. In the mean time, the local agent, aided by the private detectives and messengers of Wells, Fargo & Co., commenced search and made inquiries after the lost bar. The defendant, Clifford, went to the agent and stated that he thought the bar could be found, provided there was sufficient inducement held out. Several consultations were held upon the subject. The defendant claimed that two hundred and fifty dollars was not enough, as he would be compelled to give that amount to the parties from whom he was to get his information as to the whereabouts of the bullion, and that he was acting as a go-between and was compelled to pledge his word as to secrecy in the matter, and was also pledged not to disclose any name, and that he wanted one hundred and fifty dollars for his services. The agent and messenger of Wells, Fargo & Co. agreed that they would raise the extra one hundred and fifty dollars themselves.

They agreed to give defendant four hundred dollars for such information as would lead to the discovery of the bullion, reserving the right to prosecute any person in whose possession the bullion might be found. In pursuance of this agreement, the defendant, in company with three persons named in the agreement, started out about one o'clock A. M. to find the bullion. The defendant suggested that they had better provide themselves with a shovel or something to dig up the bar of bullion. At the lower end of town the defendant pointed out a spot where, upon digging down about six inches, the missing bar of bullion, with the marks upon it, was found.

Some four or five days subsequent to the discovery of the bullion a deputy sheriff, in company with a messenger of

Argument for Appellant.

W., F. & Co., searched the premises of Della Clifford, wife of defendant (and jointly indicted with him). In looking down the vault of the privy they discovered the handle of a bullion sack, and upon removing it it was identified as the missing sack No. 8.

The premises of Della Clifford was kept as a public saloon. The defendant spent most of his time at this house, although he was frequently at other places. There was no one in the house when the sack was found, and had not been for two or three days. Some other minor circumstances were offered in evidence tending to show that defendant was the party who had first taken the bar of bullion from the stage.

Robert M. Clarke and N. Soderberg, for Appellant:

I. The court erroneously charged the jury that if the defendant, at the time of finding the bullion, or at any time thereafter, knew the owner thereof, and feloniously appropriated and converted it to his own use, then he was as guilty of larceny as though he had originally stolen it. (1 Hill, N. Y. 94; *People v. Anderson*, 14 Johns. Id. 294; *Wright v. State*, 5 Yerg. (Tenn.) 154; *State v. England*, 8 Jones' N. C. 399; 2 Bish. Cr. Law, secs. 759, n. 17; 837, 838, 876, 880, 883; 1 Id. sec. 207.)

II. The court erred in charging the jury that if the defendant was not the finder, but some other person found the bullion, and if then or afterwards he and defendant knew who the owner of the bullion was, etc., and feloniously appropriated it, etc., they should convict defendant. (*Wilson v. People*, 39 N. Y. 459; 18 Mo. 329; 1 Hill, 94; 14 Johns. 294.)

III. The court erred in instructing the jury that "the only cases in which a party finding the property of another can be justified in appropriating it to his own use are where it may be fairly said the owner has abandoned it or where the owner can not be found." (1 Hill, 94; 14 Johns. 294; *State v. Conway*, 18 Mo. 321; Archbold Cr. Pl. 119; *Rex v. Leigh*, 2 East, P. C. 694; *Lane v. People*, 5 Gilman (Ill.) 305; *State v. Gresser*, 19 Mo. 247.)

Opinion of the Court—Hawley, J.

IV. The possession of recently stolen property unexplained is not, *per se*, *prima facie* evidence that the possessor is guilty of larceny. (*People v. Chambers*, 18 Cal. 393; *People v. Ah Ki*, 20 Id. 180; *People v. Gassaway*, 23 Id. 51; *People v. Antonio*, 27 Id. 407; 3 Green Evid. sec. 31; *State v. I. En*, 10 Nev. 277.) The testimony adduced upon the trial did not support the charge in the indictment. If it established any offense (which we deny) it was that of receiving stolen goods, an offense not embraced in the charge of larceny. (19 Cal. 601; 3 Chitty Cr. Law, 601; *Grummond v. State*, 10 Ohio, 511; *Fulton v. State*, 13 Ark. 168; *People v. Maxwell*, 24 Cal. 14; *People v. Stakem*, 40 Id. 599; *People v. Logan*, 1 Nev. 110; Comp. Laws Nev., secs. 1858, 2367, 2371.)

John R. Kittrell, Attorney General, and T. W. Healy, for Respondent:

I. The court did not err in any of its instructions as to the facts necessary to justify a conviction of the finder of lost property of the crime of larceny. (2 Russell on Crimes, 12, 13, 14, 16; *State v. Weston*, 9 Conn. 527; *Lane v. People*, 5 Gilman, 305; *People v. McGarren*, 17 Wend. 460; *State v. McCann*, 19 Mo. 249; *Reg. v. West*, 29 Eng. L. & E. 525; *Ransom v. State*, 22 Conn. 160; *Reg. v. Thurborn*, 2 C. & K. 832; *Reg. v. Moore*, L. & C. 1; 2 Whart. Cr. Law, 1792, 1795, 1801; 2 Bish. Cr. Law, secs. 880, 886; 2 Arch. Cr. P. & P. 1235, 1242; *People v. Anderson*, 14 Johns. 294; *Porter v. State*, M. & Y. 555; 2 Arch. Cr. Pr. & Pl. 1236; *Baker v. The State*, 29 Ohio St. 184; *People v. Cogdell*, 1 Hill, 94; *State v. Pratt*, 20 Iowa, 267; *Reg. v. Mole*, 1 C. & K. 417; *State v. Ferguson*, 2 McMullen, 502; *Booth v. Commonwealth*, 4 Grat. 525.

By the Court, HAWLEY, J.:

Appellant questions the correctness of several instructions given by the court as to the facts necessary to justify a conviction of the finder of lost property of the crime of larceny.

The rules of law relating to this subject and applicable to the facts of this case, as gleaned from the authorities,

Opinion of the Court—Hawley, J.

which are very numerous, may be stated in general terms as follows: When property is found in the highway, and the finder knows the owner, or there be any mark upon it by which the owner may be ascertained, and the finder instead of restoring it converts it to his own use, such conversion will constitute a felonious taking. If there be no notice of the owner at the time of finding, yet if there be a felonious intention to appropriate the property, coupled with a reasonable belief that the owner could be found, it would be larceny. But the finder of lost property who takes possession of it not intending to steal it at the time of the original taking, is not rendered guilty of larceny by any subsequent felonious intention to convert it to his own use. (*People v. McGarren*, 17 Wend. 460; *Wilson v. The People*, 39 N. Y. 461; *State v. Weston*, 9 Conn. 526; *Ransom v. The State*, 22 Id. 153; *Baker v. The State*, 29 Ohio St. 184; *Bailey v. The State*, 52 Ind. 462; *Wolffington v. State*, 53 Ind. 343; *Commonwealth v. Titus*, 116 Mass. 42; *Reg. v. Thurborn*, 2 Car. & Kir. 832; *Reg. v. Moore*, 8 Cox, C. C. 416; 2 Bish. Cr. Law, sec. 882, and other authorities there cited; 2 Wharton Cr. Law, sec. 1800.)

All portions of the charge of the court or instructions given to the jury at variance with these rules are erroneous, especially those portions which convey an intimation to the jury that any subsequent felonious intention of defendant to convert the property to his own use is sufficient to authorize a conviction.

The court also erred in refusing to give the sixth instruction asked by defendant.

When property recently stolen is found in the possession of a person accused of the theft the accused person is bound to explain the possession in order to remove its effect as a circumstance indicative of guilt. (*State v. I. En.* 10 Nev. 279.) But if there is no other evidence tending to establish the guilt of the defendant, and the jury are satisfied that he gives a reasonable account of his possession of the property, then it would be their duty to acquit.

Appellant claims that the evidence, under any theory of the prosecution, is insufficient to support a conviction of

Argument for Appellant.

larceny; that if the defendant is guilty of any offense it could only be that of receiving stolen goods. In our opinion there is ample testimony tending to show that the defendant was guilty of the offense of grand larceny, either in stealing the bar of bullion from the stage or finding it upon the highway, knowing the owner, or, it having marks upon it by which the owner might readily be ascertained, intending at the time to convert it to his own use. If the jury believed the testimony given by the defendant, in his own behalf, to be true, he was not guilty of larceny or any other offense (unless it be that of compounding a felony).

The judgment of the district court is reversed, and the cause remanded for a new trial.

[No. 940.]

W. R. MUSGROVE, EXECUTOR OF THE ESTATE OF WILLIAM PATTERSON, RESPONDENT, v. ADOLPHUS WAITZ ET AL., APPELLANTS.

CERTIFICATE OF ACKNOWLEDGMENT—TESTIMONY OF NOTARY.—Where the certificate of a notary public conforms to the provisions of the statute and the notary is called as a witness and fails to state from memory the exact amount for which the mortgage was given: *Held*, that his testimony is not entitled to any greater weight than his certificate.

IDEM.—Where the property mortgaged is situate in a compact body, and the notary and party executing the mortgage are upon the premises and the notary informs the party that the mortgage is "on all this property here:" *Held*, that this language must have been as clearly understood as if he had read the description in the mortgage.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts appear in the opinion.

Ellis & King, for Appellant:

A certificate of acknowledgment may be disproved by parol testimony. (*Dodge v. Hollingshead*, 6 Minn. 25, *Annan v. Folsom*, Id. 500; Comp. Laws, 259.) The certificate must show that the wife was examined in the manner prescribed by the statute. (*Jordan v. Corey*, 2 Ind. 385.)

Opinion of the Court—Hawley, J.

The officer did not inform the defendant of the contents of the instrument (Comp. Laws, 250). He did not read it to her.

T. W. W. Davies, for Respondent:

By the Court, HAWLEY, J.:

This is an action to foreclose a mortgage executed by appellants.

The appellant, Ann Waitz, in her separate answer, denied that she ever acknowledged the execution of said mortgage; that she ever knew the contents thereof, or that the contents were ever made known to her.

The only questions presented by this appeal, which are relied upon by appellants, relate exclusively to the sufficiency of the proof upon these points. The certificate of the notary substantially conforms to the provisions of the statute (1 Comp. Laws, 250-251). It is admitted that it makes out a *prima facie* case in favor of respondent, and that it was unnecessary for him to have introduced any other proof; but upon the trial he chose to introduce the notary before whom the acknowledgment was taken, and appellant claims that his testimony contradicts his certificate and establishes the facts in their favor.

The notary testifies that he did not read the entire mortgage to Mrs. Waitz. This was unnecessary. The law only requires that she should be "made acquainted with the contents." The witness says he "informed Mrs. Waitz of the contents of the mortgage before taking her acknowledgment." He did not describe to her the property mentioned in the mortgage by the number of the lots and block as named in the mortgage. It appears that the property mortgaged is in a compact body fronting on the north side of King street, in Carson, and lying between Curry street and an alley. The notary was upon the premises at the time of taking the acknowledgment and said to Mrs. Waitz that the mortgage was "on all this property here." Situated as the parties then were, this language of the notary must have been as clearly understood by her as if he had read the

Points decided.

description in the mortgage. He testified upon cross-examination that he told Mrs. Waitz that the mortgage secured a note for \$1500. He was very positive as to the amount. Upon his re-examination he said: "I only had an idea that such was the amount; upon examination of the mortgage now I find the amount is \$3000, and is fully written out in words. The amount named in the mortgage is what I told her, and that is \$3000."

In the course of his testimony he said: "All the averments in the certificate of acknowledgment to this mortgage are true." This testimony shows that the recollection of the witness was in some respects at fault, and required the introduction of the mortgage to refresh his memory as to the actual facts. We apprehend there are very few of the officers authorized by law to take acknowledgments who could, after the lapse of two or three years, state from memory only the exact amount of every mortgage to which they had attached their certificate of acknowledgment. The fickle recollection of a witness, after such a period of time, is not entitled to any greater weight than his certificate, under seal, given at the time of the occurrence.

In this case the testimony not only fails to contradict the certificate of the officer in any essential particular, but in fact supports it upon every material point.

The judgment of the district court is affirmed.

[No. 935.]

THE STATE OF NEVADA, RESPONDENT, v. AH CHUEY,
ALIAS SAM GOOD, APPELLANT.

IDENTITY OF PRISONER—EXHIBITION OF TATTOO MARKS UPON THE PERSON—ART. 1, SEC. 8, CONSTITUTION DISCUSSED AND CONSTRUED.—Upon the trial, a question was raised as to the identity of the defendant. One witness testified that he knew the defendant, and knew that he had tattoo marks (a female head and bust) on his right forearm. The court thereupon compelled the defendant, against his objection, to exhibit his arm, in such a manner as to show the marks to the jury: *Held*, that this action of the court was not in violation of the clause in the State Constitution, which declares that no person shall be compelled "in any criminal case, to be a witness against himself;" that it was not prejudicial to defendant and was not erroneous. (Leonard, J., dissenting.)

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30*1081
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Argument for Appellant.

CORPUS DELICTI—CIRCUMSTANTIAL EVIDENCE—Proof of *corpus delicti* may be shown by circumstantial evidence.

IDEM—SUFFICIENCY OF EVIDENCE.—Where it was shown that the house where the dead body (claimed to be the body of Ah Tong, alleged in the indictment to have been killed by Ah Chuey) was found, was used as a Chinese wash-house; that Ah Tong was the proprietor; that he was assisted by two other Chinamen; that these three persons were usually at the house; that the wash-house was being used as usual on the day of the homicide; that some human being therein was killed; that the house was consumed by fire after the homicide occurred; that the body of the deceased was badly charred; that Ah Tong had never been seen after the homicide, and that the other occupants had been seen and were alive: *Held*, that these circumstances tended to establish the fact that the body found in the wash-house was the body of Ah Tong.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts sufficiently appear in the opinion.

Robert M. Clarke and N. Soderberg, for Appellant.

I. The court erred in compelling defendant to exhibit the tattoo mark on his arm to the jury. This was compelling him to testify against himself. (Cons. of Nevada, sec. 8, 18; Comp. Laws, sec. 2305, 2306; U. S. Dig. 1st series, vol. XIV., p. 693, sec. 4630, 4643, 4659; Cooley's Cons. Lim. (1868), 305; *State v. Jacobs*, 5 Jones (N. C.), L. 259; *Rex v. Worsenham*, 1 Ld. Raym. R. 705; *Reg. v. Mead*, 2 Id. 927; *Rex v. Shelly*, 3 Term R. 142; 1 Green. Ev. sec. 451; Whart, Cr. L. sec. 807; 2 Phillips Ev. 929; *Stokes v. State* (recent term case), 3 Cent. Law Jour. pp. 316-17, 36 Cal. 529; 123 Mass. 222.

II. There is an entire want of evidence of the *corpus delicti*. The only testimony in the record that Ah Tong is dead, are the extra judicial statements of defendant testified to by a hostile Chinaman, which are entirely improbable and unworthy of credence. (*Smith's case*, 21 Grat. 809; *People v. Jones*, 31 Cal. 565; 3 Green. Ev. sec. 30; 1 Whar. Am. Cr. Law, sec. 745 *et seq.*; *Blackburn v. State*, 23 Ohio St. 146; 1 Green. Ev. sec. 217; *People v. Hennessy*, 15 Wend. 148; *Stringfellow v. State*, 26 Miss. 157, 32 Id. 450; 33 Id., 352; 18 (N. Y.), 179, 189.)

Opinion of the Court—Hawley, J.

Wm. Cain, District Attorney of Washoe County, for Respondent.

I. There was sufficient proof of the *corpus delicti*. (2 Green. Ev., sec. 30; Burrill Cir. Ev., p. 677, *et seq.*; 1 Whart. Cr. Law, secs. 746-7.

II. It is always proper to identify a person by his appearance, marks upon his person, dress, stature, voice, etc. (Wills Cir. Ev.; Burrill's Cir. Ev. 635-7-8; 650.)

By the Court, HAWLEY, J.

The constitution of this state declares that no person shall be compelled, "in any criminal case, to be a witness against himself." (Art. 1, sec. 8.)

On the trial of this case the court compelled the defendant, against his objection, to exhibit his arm so as to show certain tattoo marks thereon to the jury (a witness having previously testified that such marks were upon the defendant's arm). Was this compelling the defendant to be a witness against himself? What is meant by the constitutional clause above referred to? Perhaps the best way of answering these questions would be to state the history which led to the adoption of this constitutional provision. A similar provision is found in the constitution of nearly every state of the union and in the constitution of the United States.

In the early history of England accused persons were compelled to testify in answer to any criminal charge brought against them. With the advancing spirit of the age it was claimed that no man ought to be compelled to accuse himself of any crime, and by degrees the rule was changed to its present state in accordance with what seemed to be the public sentiment of the country. Story, in his commentaries on the constitution of the United States, says: That the insertion of this clause "is but an affirmance of the common law privilege." It was, according to his views, adopted to prevent the evils which had resulted from the custom of other countries in compelling criminals to give evidence against themselves and of being "subjected to the rack or torture in order to procure a confession of guilt." (2 Story on the Const. 1788.)

Opinion of the Court—Hawley, J.

Blackstone claims that the trial by torture was unknown to the law of England. In referring to this custom he says: "It seems astonishing that this usage of administering the torture should be said to arise from a tenderness to the lives of men; and yet this is the reason given for its introduction in the civil law, and its subsequent adoption by the French and other foreign nations, viz.: because the laws can not endure that any man should die upon the evidence of a false or even a single witness, and, therefore, contrived this method that innocence should manifest itself by a stout denial, or guilt by a plain confession, thus rating a man's virtue by the hardness of his constitution, and his guilt by the sensibility of his nerves." (4 Black. Com. 326.) This learned commentator, in order to ~~fully~~ expose the fallacy of this reason, quotes, with approval, the language of Tully, that notwithstanding pain governs those tortures, the quæstor rules and regulates as well the mind as the body of every one; desire inclines; hope bribes; fear enfeebles; so that in such a distressed state of things no room is left for the truth. It does, indeed, seem strange, at this day, that a people as intelligent and enlightened as the Romans were did not earlier discover the utter futility of this mode of punishment to extract the truth. It may be, however, that the wisdom of future ages will discover and bring to light the errors of the system which we have adopted in the United States, in order to accomplish that very useful purpose. It has already been assailed by James Fitzjames Stephens, and other prominent and able writers on the criminal law.

I have referred to this subject, not for the purpose of pointing out or expressing any opinion upon the merits or demerits of any particular system, but to show as a fact that in all countries and in all ages, whatever the law or custom may have been, it was always claimed as a reason for its adoption that it was calculated to discover the truth, and thereby promote the ends of justice. Such is claimed to be the rule of our constitution and laws upon this question.

The object of every criminal trial is to ascertain the truth.
Why say criminal?

Opinion of the Court—Hawley, J.

The constitution prohibits the state from compelling a defendant to be a witness against himself because it was believed that he might, by the flattery of hope or suspicion of fear, be induced to tell a falsehood.

None of the many reasons urged against the rack or torture or against the rule compelling a man "to be a witness against himself" can be urged against the act of compelling a defendant, upon a criminal trial, to bare his arm in the presence of the jury so as to enable them to discover whether or not a certain mark could be seen imprinted thereon. Such an examination could not, in the very nature of things, lead to a falsehood. In fact, its only object is to discover the truth; and it would be a sad commentary upon the wisdom of the framers of our Constitution to say that by the adoption of such a clause they have effectually closed the door of investigation tending to establish the truth.

Confessions of persons accused of crime, whenever obtained by the influence of hope or fear, are excluded because in considering the motives which actuate the mind of man they might be induced to make a false statement. Yet, notwithstanding the universality of this rule of law, whenever the confession, however improperly or illegally obtained, has led to the discovery of any given fact, that fact is always admitted in evidence, because the reasons which would have excluded the confession no longer exist. This is the governing and controlling principle of the law.

The constitution means just what a fair and reasonable interpretation of its language imports. No person shall be compelled to be a witness, that is to testify, against himself. To use the common phrase, it "closes the mouth" of the prisoner. A defendant in a criminal case can not be compelled to give evidence under oath or affirmation or make any statement for the purpose of proving or disproving any question at issue before any tribunal, court, judge or magistrate. This is the shield under which he is protected by the strong arm of the law, and this protection was given, not for the purpose of evading the truth, but, as before stated, for the reason that in the sound judgment of the men who framed the constitution it was thought that owing

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to the weakness of human nature and the various motives that actuate mankind, a defendant accused of crime might be tempted to give testimony against himself that was not true.

The State v. Jacobs, 5 Jones, N. C. 259, and *Stokes v. The State* (an unreported Tennessee case referred to in a note to vol. 1, Wharton's Law of Evidence, sec. 347), have been cited and are relied upon to sustain the position that the act of compelling Ah Chuey to bare his arm was in violation of his constitutional rights.

In the *Jacobs* case the court decided that "a Judge has not the right to compel a defendant in a criminal prosecution to exhibit himself to the inspection of the jury for the purpose of enabling them to determine his status as a free negro." This decision was based upon two grounds: First, upon the general rule that a witness could not be compelled to furnish any evidence that would tend to criminate himself. Second, that the manner in which the defendant was compelled to exhibit himself was prejudicial to the defendant. I do not propose to deny the correctness of that decision, but I do insist that it can not be sustained upon the first ground stated therein.

In the subsequent case of *The State v. Johnson*, 67 N. C. 58, the court, in my opinion, declare the correct principle that governed the *Jacobs* case and distinguished it from the one then under consideration, viz.: In the *Jacobs* case the defendant was compelled to exhibit himself to the jury so that the "jury might determine by inspection his quality and condition—his blood or race." That was a matter to be proved by the oath of witnesses who knew the facts, or it may be by experts.

It is a noticeable fact that in none of the subsequent cases in that state, where the *Jacobs* case was cited, have the courts sanctioned or in any manner approved of the first reasoning upon which the decision was based. Whilst they have taken especial pains to distinguish the facts in the respective cases, they have, without disturbing the decision, virtually refused to acknowledge the reasoning of the court as applicable to cases of a similar character.

In *The State v. Woodruff*, 67 N. C. 89, where an issue of bastardy was being tried, the mother of the child, when examined as a witness, held the child in her arms, and the counsel in addressing the jury called attention to its features and commented upon its resemblance to the defendant, the child being still in its mother's arms. This was held not to be error.

Now, how could the jury determine the resemblance, unless they also examined the features of the reputed father? Was he not compelled to furnish evidence against himself by exhibiting his face to the jury? Surely, if the constitution protects a defendant, it could not possibly make any difference whether the defendant exhibited himself in sitting down or standing up; in allowing the jury to look at his features or the color of his hair; to look at a mark plainly visible upon his face or examine marks upon his person concealed by his ordinary clothing. Does he not furnish as much evidence against himself in the one case as the other? Looking, then, at the facts, and applying thereto the principles of common sense, did not Woodruff in the one case furnish more evidence against himself than Jacobs did in the other? If the broad mantle of this provision of the constitution covers the one case, it certainly does the other. But the truth is, that the difference between the cases, as held by the respective courts, relates exclusively to the manner in which the defendant is compelled to exhibit himself, and is not in any way governed or controlled by the constitution.

It was admitted in the oral argument that a jury might look at the features of the defendant and examine marks upon any part of his person not concealed by his ordinary clothing, so long as he was not compelled to exhibit himself to the jury, but it was very earnestly contended that the inspection could go no further; that the defendant, under the facts of this case, could not be compelled to draw up his shirt sleeve so as to exhibit the tattoo mark upon his wrist or forearm, because such an act was compelling the defendant to furnish evidence against himself, in violation of a provision of the constitution.

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From a constitutional standpoint, what does this argument amount to? If, in order to establish the identity of any defendant in a criminal case, it became necessary to examine a peculiar mark on the back of his neck, the admissibility of such an examination would, under the rule contended for, depend solely upon the size and style of his shirt collar. If he wore a turn-down collar, the mark would be visible without removing any of his ordinary clothing, and could be examined by the jury; but if he insisted upon the most approved fashion and wore a standing collar, close fitting to the neck, the mark would be concealed by his ordinary clothing and could not be examined.

In another case the defendant's hair might be long enough to conceal any scar upon his neck; but, if he had his hair cut before coming into court, the barber's shears—by clipping his curls—might destroy all protection given by the constitution.

The style of dress which men and women wear is regulated, to some extent, by the custom and fashion of the community where they reside. The admissibility of evidence of this character would, under the sound reasoning and logical view of this rule, fluctuate and change by the peculiar whims, caprice, fashion, or frivolity of the particular community where the defendant is tried. If the defendant is a woman, and the custom is for her sex to go closely veiled whenever appearing in public, if her identity is questioned and made to depend to some extent upon the presence of a peculiar scar upon her cheek, she would, under the sanctity of the constitution, be protected from removing her veil, and the jury would not be allowed to even examine the features of her face.

In *The State v. Garrett*, 71 N. C. 85, the defendant was indicted for murder. On the night of the homicide, defendant stated to the persons present that the deceased came to her death by her clothes accidentally catching fire while deceased was asleep, and that she (defendant), in attempting to put out the flames, "burnt one of her hands." At the coroner's inquest, the defendant was compelled to unwrap the hand she stated had been burnt and exhibit it

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to a physician there present, "and there was no indication of any burn whatever upon it."

Upon the trial of the case, "the court ruled that anything the prisoner said at the inquest was inadmissible; but that the actual condition of her hand, although she was ordered by the coroner to unwrap it and exhibit to the doctor, was admissible as material evidence to contradict her statement to the witness on the night of the homicide." This ruling was sustained by the supreme court. How is it that the constitution would not reach this case as well as the case of Jacobs? Is it because Jacobs was compelled to exhibit his head in court, whereas Garrett was only compelled to exhibit her hand to a physician at a coroner's inquest? Is the force of the constitutional provision limited to acts within the walls of a court-room? Can it be possible that it has no application out of sight of the particular "temple of justice" where the case is tried? Could a defendant be compelled against his objection to open his mouth and testify upon his preliminary examination before a committing magistrate? Would other witnesses who were present at such examination be allowed to detail upon the trial the testimony so given? Is there not a broad and substantial distinction between the testimony given by a defendant under oath, or statements made under a false promise or improper inducement, upon the one side, and evidence of physical facts obtained from such testimony, or in any other manner, on the other side?

If the constitution was applicable to Jacobs' case, and protected him from being compelled to give evidence against himself by exhibiting his head to the jury, then it ought to have been applied to Garrett's case, and protected her from being compelled to give evidence against herself by exhibiting her hand to the physician at the coroner's inquest.

Take the case of Stokes. The prosecution sought to compel the defendant in the court-room to put his foot in a pan of mud, in order to identify the track thus made with a track found in mud of equal softness and similar character, made by a bare foot near the scene of the homicide. The

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court refused to compel the defendant "to put his foot in it." On appeal, the case was reversed because this circumstance might have had an influence on the jury prejudicial to the defendant.

It is argued that the act of the prosecution tended to compel the defendant to make evidence against himself. I am of opinion that too much importance has been attached and too much prominence given to the words "compelled to make evidence against himself." The defendant Stokes, if he was the guilty person, was making evidence against himself when he put his foot in the mud near the scene of the homicide, and when arrested he could have been compelled to put his foot in that track, against his will, and if his foot corresponded with the track, that fact would have been admissible upon the trial of his case. (*State v. Graham*, 74 N. C. 646.)

In a case of homicide the defendant makes evidence against himself by being compelled to surrender the weapon with which the offense was committed, for it can always be used as evidence against him. A burglar is compelled to give evidence against himself when he is forced to surrender false keys and other burglarious instruments found in his possession. A counterfeiter is compelled to give evidence against himself when the dies he had manufactured and used are discovered and brought into court for inspection.

The application of the principle sought to be enforced upon the reasoning of the court in Jacobs' case, as being within the protection of the constitution, would, if logically carried out, apply to all these and many other similar cases.

From whatever standpoint this question can be considered, the truth forces itself upon my mind that no evidence of physical facts can, upon any established principle of law, or upon any substantial reason, be held to come within the letter or spirit of the constitution. The question of whether or not the court erred in compelling the defendant Ah Chuey to exhibit his arm must, in my opinion, be determined upon other grounds. Was the defendant compelled to exhibit himself in such a manner

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as to (unjustly or improperly) prejudice his case before the jury? Did the act in question have a tendency to degrade, humiliate, insult or disgrace the defendant? Did the judge, by the act in question, convey to the jury the idea that he believed the defendant to be guilty of the offense charged against him? If either of these questions ought to be answered in the affirmative, then I think the defendant should be granted a new trial. A defendant in a criminal case is entitled to a fair and impartial trial, free from insult or obloquy, and courts cannot be too particular in guarding his personal rights and privileges. He should never be compelled to make any indecent or offensive exhibition of his person for any purpose whatever. The judge presiding at the trial should not express any opinion upon the facts (*State v. Tickel*, 13 Nev. 502, and the authorities there cited), or compel the defendant to do any act which would clearly convey to the jury an intimation that the defendant was guilty of the offense charged, or to exhibit himself in such a manner as to prejudice his case before the jury.

The guilt or innocence of the defendant is a question to be determined by the jury, free from any improper influence of any kind or character whatever. The cases of *The State v. Jacobs* and *Stokes v. The State* are authorities worthy of consideration upon this branch of this case. Every case, however, where these questions arise, must necessarily be decided upon its own peculiar facts and circumstances. It is not shown that there was anything indecent or offensive in the mere exhibition of defendant's arm to the jury. It does not appear to me that such an act would have a tendency to insult, degrade or humiliate the defendant.

After giving to all these questions unusual deliberation, my conclusion is that the act of the court in compelling the defendant to exhibit his arm did not tend, independent of the fact of the tattoo marks being found, to improperly influence or prejudice the defendant's case before the jury.

From time immemorial it has been the custom in this country, sanctioned by the constitution and laws of the

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respective states, to identify persons accused of crime by examining the peculiar color of their hair, the peculiarity of their features, conspicuous scars upon their persons, the want of an eye or tooth, "or any other visible defect or mutilation." (Burrill on Circumstantial Evidence, 639-651.) Marks made by wounds upon the person of an offender given with a weapon in the hands of an assaulted party, corresponding with marks visible upon the person of the prisoner, have always been considered as a strong criminating circumstance tending to establish the identity and guilt of the accused person. (Burrill on Circumstantial Evidence, 641.)

In discussing the various means of identifying persons this author says: "There are cases, again, in which the identity being positively sworn to, and as positively denied, the witness resorts to another class of circumstances as tests of the accuracy of his testimony, such as marks upon the person not prominently visible, or even such as are quite concealed by the ordinary clothing, and thus invisible to any but one who has been intimately acquainted with the subject, and who consequently possesses the most complete means of knowing its identity." (Burrill on Circumstantial Evidence, 644.)

Many cases are cited in the books where evidence of this character has been admitted; and, although not always conclusive, it has frequently been very efficacious in enabling juries to satisfactorily determine the disputed question of identity. I shall refer to but one case. Joseph Parker was indicted and tried for bigamy, at the Court of Oyer and Terminer in New York, in 1804, under the name of Thomas Hoag, *alias* Joseph Parker. Numerous witnesses were examined, who stated, in positive terms, that they knew defendant was Thomas Hoag. Many peculiarities in the features, voice, style and habits were testified to; also the fact of "a scar on his forehead, partly covered by his hair, and another scar on his neck." These peculiarities were all observable in the prisoner. On the other hand witnesses were equally positive that the defendant was not Thomas Hoag, but was Joseph Parker. Finally, "among the marks

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sworn to have been observed on the person of Thomas Hoag, was a large and visible scar under one of his feet, occasioned by his having trodden on a drawing-knife, which some of the witnesses swore they had seen. This proved to be a decisive circumstance in the prisoner's favor. For, on exhibiting his feet to the jury, not the least mark or scar could be seen upon either." (Burrill on Circumstantial Evidence, 650.)

This case brings to mind another view of the constitutional phase of this question.

Under the law, as it existed for many years in the several states, a defendant was not allowed to testify in his own behalf. If the principle contended for by appellant is correct Parker ought not to have been allowed to exhibit his feet to the jury, because this was allowing him to make evidence in his own behalf. Would any court in christendom, in construing such a law, refuse to allow the defendant to establish a fact in his own favor in the manner allowed in Parker's case?

To illustrate this proposition. Suppose the truth to have been that the defendant in this case was really Sam Good, as he claimed, and not Ah Chuey, as was claimed by the prosecution; that the witness Rhoades was mistaken in his testimony, and that the laws of the State prohibited a defendant from testifying in his own behalf, and the court had refused to allow the defendant to pull up his sleeve so as to exhibit his arm for the purpose of showing as a fact that there was no tattoo mark thereon as testified to by the witness Rhoades. Could such a ruling have been sustained upon the ground that the exhibition of his arm was allowing him to testify in his own behalf? Certainly not. Why? Because that law, as well as the clause of our state constitution, relates to testimony given by the defendant or statements made by him, and can not be applied to prevent the ascertainment of the truth as to the existence or non-existence of any scar or mark upon the defendant's person by allowing him in the one case or compelling him in the other to exhibit the fact to the jury.

In discussing the questions involved in this case I wish

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it to be distinctly understood that it has not been my intention in any manner, shape, or form to deny the correctness of the general and well-established principle of law that a witness can not, either in a civil or criminal case, be compelled to give any testimony which would have a tendency to convict him of any criminal offense. This principle applies as well to the production of letters or documents, the contents of which would tend to criminate him, as to his oral testimony. But of all the numerous authorities upon this point to which my attention has been called, there is but one, that of *The State v. Jacobs*, which, in my opinion, has attempted in any way to apply that principle to the facts of a case at all analogous to the one under consideration. I have endeavored to show that the *Jacobs* case could not be sustained upon that ground, either under the provisions of the constitution or upon any principle of the common law.

One other question remains to be considered. Is there any evidence in the record tending to establish the fact that Ah Tong (the person alleged to have been killed by Ah Chuey) is dead? Proof of the *corpus delicti* may be established by circumstantial evidence, provided it is satisfactory.

“Even in the case of homicide,” says Greenleaf, “though ordinarily there ought to be testimony of persons who have seen and identified the body, yet this is not indispensably necessary in cases where the proof of the death is so strong and intense as to produce the full assurance of moral certainty.” (3 Green. on Ev., sec. 30.)

Upon the question of the identity of deceased persons, Wharton says: “It may be regarded as settled law that although it is necessary, in a case of murder, that identity should be proved, yet this identity may be shown as effectively by inferences from facts, as from the positive testimony of witnesses who saw the alleged body of the deceased.” (Wharton’s Law of Homicide, sec. 640.)

It is shown by the testimony of white witnesses that the house where the dead body (claimed by the prosecution to be the body of Ah Tong) was found, was used as a Chinese

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wash-house; that Ah Tong was the proprietor; that he was assisted in the business by two other Chinamen; that these three persons were usually at the house; that the wash-house was being used as usual on the day of the homicide; that some human being therein was killed; that the house was consumed by fire after the homicide occurred; that the body of the deceased was badly charred by the fire; that Ah Tong had never been seen after the homicide occurred, and that the other occupants of the house had been seen and were alive.

These circumstances, without referring to any other testimony, tended to establish the fact that the body found in the wash-house was the body of Ah Tong. This being true, the verdict of the jury establishing the identity will not be disturbed. (*State v. Williams*, 7 Jones, N. C. 446.) The testimony in the bill of exceptions points directly to the defendant as the person who committed the offense.

I am of opinion that the judgment of the district court ought to be affirmed, and the court below directed to fix a day for carrying the sentence into execution.

It is so ordered.

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Being unable to concur in the opinion and judgment of the court in this case, I deem it proper to give a more complete statement of the facts presented by the record, to the end that I may more clearly explain the grounds of my dissent.

Defendant was convicted of murder in the first degree for the killing of one Ah Tong, in Reno.

There was testimony admitted on behalf of the state which, without considering defendant's extra-judicial statement, tended, at least, to establish the fact that the defendant and another Chinaman, on the twenty-fourth day of December, 1877, at Reno, killed some human being in a wash-house, and afterwards set fire to the building, and hastily departed while it was in flames. The remains of the deceased were found, but were so burned and disfigured that identification of the body was im-

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possible; and, in fact, none was attempted by the coroner who held an inquest upon the body and buried it. In addition to the testimony already referred to, Ah Chung, a Chinese witness, after stating that Ah Tong was his cousin, testified to certain statements, claimed to have been made by the defendant in a gambling house in Virginia, on or about January 8, 1878, and overheard by the witness, which were, in substance, that when defendant was gambling and having bad luck witness heard him say, "That money no good;" that another man asked him, "Why the money was no good;" that defendant replied, "Down in Reno he killed Ah Tong;" that he, defendant, bought pepper, and another man threw it, when he, defendant, killed him; that he gave \$30 to the man who threw the pepper, and \$120 was his share.

It was necessary, of course, for the state to prove not only the *corpus delicti*, the body of the crime charged—that Ah Tong was dead, and that he came to his death by violence inflicted by human agency—but it was also necessary to prove that the defendant, Ah Chuey, was the guilty agent. The state did not pretend that the defendant killed Ah Tong unless he was the same person who, it was claimed, with another Chinaman, set fire to the wash-house after shooting the deceased.

Witnesses testified that the defendant was Ah Chuey, and that he was the same person who went towards the wash-house a few minutes before they heard two or three shots, and that he was one of the two Chinamen who ran away from the house a short time after, when the house was in flames. But the same witnesses also stated that on the twenty-fourth day of December, 1877, the defendant was a tall, light-complexioned, straight, good-looking Chinaman, while at the trial he was not so in many respects. There was testimony tending to show that between the date of the homicide and the trial, some of his features, noticeably his mouth, and his complexion, had been greatly changed, either from natural causes or by artificial means. At any rate, the general appearance of the defendant in court was very different from that of the Chinaman who, it was claimed, killed

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Ah Tong, and set fire to the wash-house. It must be borne in mind, also, that defendant denied being Ah Chuey, and gave "Sam Good" as his name. Such being the case, it became a matter of the first importance for the state to identify the defendant, to convince the jury, that although he called himself "Sam Good," and although his appearance had been changed, still he was the veritable Ah Chuey, seen and recognized by the witnesses on the day of the homicide going to and from the scene of the crime. For the purpose stated, S. H. Rhoades was called by the state and testified that he knew defendant by two names: "Tom" and "Ah Chuey;" that he had known him a year or such a matter; that the defendant had marks on his person by which he knew him; that he had an India-ink mark on his right forearm; that he knew him before his arrest; that he saw the mark on his arm in Reno before his arrest; saw him twice after, once in Reno and once in the district court in Virginia; that the mark was a female head and bust.

The district attorney then directed the defendant to exhibit his arm. His counsel "objected to the defendant being exhibited as a witness against himself, or being compelled to make an exhibition of himself as a witness against himself; that such evidence was incompetent." The court overruled the objection and defendant excepted. Defendant was then brought before the jury by the sheriff and made to exhibit his arm, which was tattooed as described by the witness.

The court's ruling in this connection is claimed to be error.

That a defendant in a criminal action can not be compelled to be a witness against himself is not questioned by counsel for the state, nor by the court; and the inquiry before us is, whether or not the compulsion complained of deprived defendant of a substantial right secured by the constitution and laws, statute and common. Had the district attorney asked the defendant whether he had on his right forearm the tattoo mark described, and had the court, against defendant's consent, compelled him to answer that he had such mark, there can be no doubt that such action

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would have been a grave error. Could the court at the trial, in the presence of the jury, by other forcible means, accomplish indirectly what it could not do by direct means? Was the compulsion complained of an infringement of the spirit of the common law and the constitution? The fact which the state desired to establish for the purpose of defendant's identification, was the existence of the mark described. There were three possible, if not proper, methods of establishing the desired fact to the satisfaction of the jury: By the testimony of witnesses who had seen the mark, the voluntary or involuntary admission of defendant that he had such mark, and by an actual inspection by the jury. The latter method was adopted in part, without the defendant's consent, and after the ruling of the court upon the competency and propriety of such method of proof, it must be admitted to have been as convincing to the jury of the fact sought to be proved as any evidence which might have resulted from either of the other methods named could possibly have been. That it would have been competent to prove the fact sought by the first method—the testimony of witnesses other than the defendant—or by the voluntary admission of the defendant, there can be no doubt. That an involuntary admission or statement of the fact by defendant before the jury would not have been competent or proper, is just as certain. We arrive then at the inevitable conclusion that a result as detrimental to defendant was reached by the method adopted, as could have come from either of the proper methods mentioned, or by the one admitted to be improper. In other words, compelling defendant to exhibit the mark to the jury, established the desired fact as conclusively, at least, as the competent testimony of witnesses, or a voluntary or compulsory admission of defendant, could have done.

So far as I am able to ascertain the fact, every state in the Union has a provision in its constitution protecting persons accused of a crime from criminating themselves, except New Jersey, Georgia and Iowa. It seems from *Higdon v. Heard*, 14 Geo. 259, that the former constitution of that state had a provision like ours; but in the new constitution, adopted

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in 1868, I find none. In some of the states the provision is like ours that "no person in a criminal case shall be compelled to be a witness against himself." In others, that such person shall not be compelled to give evidence against himself." In others, that such person "shall not be compelled to testify against himself." In Kansas it is that "no person shall be a witness against himself." In others, that "no person in a criminal case shall be compelled to furnish or give evidence against himself." In Maryland, that "no man ought to be compelled to give evidence against himself." In Rhode Island, that "no man in a court of common law shall be compelled to give evidence criminating himself." I have no doubt that the intention of the different states in adopting these provisions was the same; and yet, technically, some give greater protection than others. Prohibiting a person from being compelled to give evidence, is certainly the same as a prohibition against compelling him to be a witness. But strictly speaking, the provision that "no person in a criminal case shall be compelled to testify against himself" affords less protection than either of the others just mentioned.

As I understand, the court construes the clause in question of our constitution as though it read: "No person, etc., shall be compelled to testify or make any statement against himself;" and that it gives the accused no other protection except from acts "which have a tendency to degrade, humiliate, insult or disgrace" him. I quote from the decision: "The constitution means just what a fair and reasonable interpretation of its language imports. No person shall be compelled to be a witness, that is, to testify against himself. To use the common phrase, it 'closes the mouth of the prisoner.' A defendant in a criminal case can not be compelled to give evidence under oath or affirmation for the purpose of proving or disproving any question at issue before any tribunal, court, judge, or magistrate. This is the shield under which he is protected by the strong arm of the law, and this protection was given, not for the purpose of evading the truth, but, as before stated, for the sole reason that in the sound judgment of the men who framed

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the constitution, it was thought that owing to the weakness of human nature and the various motives that actuate mankind, a defendant accused of crime might be tempted to give testimony against himself that was not true." Again, the court says: * * * "In all countries and in all ages, whatever the law or custom may have been, it was always claimed as a reason for its adoption that it was calculated to discover the truth, and thereby promote the ends of justice. Such is claimed to be the rule of our constitution and laws upon this question."

In my opinion, the court has not stated the only reason why the provision in question was placed in the constitution. Had that been the only one, there would have been a prohibition against allowing a defendant to testify for himself; because in the latter case there was and is a hundred-fold more danger of falsehood than in the former. Is there not an additional reason why this provision was adopted? Was it not, in part at least, because of the enlightened spirit of the age, that a man accused of a crime should not be compelled to furnish evidence of any kind which might tend to his conviction? Did it not come, to some extent, from the spirit of justice and humanity which established the first of all legal presumptions—that every person shall be considered innocent until proved guilty? (See *Wilkins v. Malone*, 14 Ind. 156.) Mr. Starkie says: "Upon a principle of humanity, as well as of policy, every witness is protected from answering questions by doing which he would criminate himself; of policy because it would place the witness under the strongest temptation to commit the crime of perjury; and of humanity, because it would be to extort a confession of the truth by a kind of duress, every species and degree of which the law abhors." (Starkie on Evidence, 40.) It will be noticed that the author says "a witness is protected from answering questions," etc., which, I admit, does not, in terms, cover this case; but I quote it for the purpose of showing, from him, that the reason why the provision of the constitution under consideration was inserted was not solely to prevent the accused from stating a falsehood, whether for or against himself.

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In 1853 the constitution of Arkansas provided that "in all criminal prosecutions the accused shall not be compelled to give evidence against himself." In the present constitution the provision is the same as ours. To give evidence is certainly to be a witness, and there is no substantial difference between them. In construing the provision in the old constitution (*State v. Quarles*, 13 Ark. 309) the court said: "This places a restriction upon the power of the legislature to the extent that no law can be enacted by that body to compel one accused to give evidence against himself, and by necessary implication also prohibits any law by which a witness in any prosecution should be compelled to disclose criminal matters against himself, so long as it might remain lawful that such disclosures could be afterwards produced in evidence against him in case he in turn should be the accused party. Hence it seems inevitable that, although witnesses are not expressed in the terms of the provision of the bill of rights that we are considering, yet they are substantially embraced to the full extent of a complete guarantee against self-accusation. Consequently, so long as the common law rule might prevail, that voluntary disclosures of a witness in a criminal prosecution may be used in evidence in an after prosecution against him, when he in turn had become the accused party, he would be as much entitled to this guarantee when interrogated as a witness as the accused party." The books are full of the same doctrine. (*People v. Hackley*, 24 N. Y. 75.)

In Wharton's Law of Evidence, section 536, it is said that "a witness cannot be compelled to give a link to a chain of evidence by which his conviction of a criminal offense can be insured;" and, also, section 731, "What is elsewhere said as to the protection of witnesses from questions which call for criminatory answers, applies to the production of criminatory documents. Neither equity nor common-law practice will compel a person to allow the inspection of either public or private documents in his custody, where the document, if produced, would criminate the party producing." (See also section 533.) And

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in Taylor's Law of Evidence, the author says in section 1351: "In accordance with the invariable rule which protects a witness or party from being compelled to furnish evidence that may expose him to a criminal charge, neither the court of queen's bench nor the court of chancery will ever oblige a person to allow the inspection of either public or private documents in his custody, where the inspection is sought for the purpose of supporting a prosecution against himself." In *Regina v. Mead*, 2 Ld. Raymond, the defendant and others were incorporated by the name of the surveyors of highways and were trustees of a charity. An information was preferred against the defendant for executing this office without having taken the oath as required by statute. The defendant pleaded not guilty. Counsel for the prosecution moved for a rule, that the prosecutor might have two books produced which these surveyors kept, in which they entered their elections, and also their receipts and disbursements, and that he might take copies of what he thought necessary, and that the books might be produced at the next assizes at the trial. "But *per curiam* denied, because they are perfectly of a private nature, and it would be to make a man produce evidence against himself in a criminal prosecution." (See also *Dominus Rex v. Cornelius et al.*, 2 Strange, 1210; 24 How. Pr. 21, *Bank v. Trapp*.)

If the reason stated by the court is the only one why the accused is not compelled to be a witness against himself, why is it that neither himself, nor an ordinary witness even, can be compelled either to testify or to produce any criminatory book or document? The book or paper cannot be falsified—it speaks for itself, just as did the mark on defendant's arm. Cannot "the many reasons urged against the rack or torture or against the rule compelling a man to be a witness against himself" be urged as well, and with the same propriety, against compelling criminating disclosures by the exhibition of physical peculiarities, as against the production of criminatory documents?

I think the framers of the constitution and the people who adopted it intended that at criminal trials the accused,

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if such should be his wish, should not only have the right to close his mouth, but that he might fold his arms as well, and refuse to be a witness against himself in any sense or to any extent, by furnishing or giving evidence against himself, whether testimony under oath or affirmation, or confessions or admissions without either, or proofs of a physical nature. A witness is often required to appear in court by *subpœna duces tecum*, simply for the production of a book or paper, with no intention on the part of the person calling him of having him testify, and yet he is a witness and can be punished for contempt if he wrongfully disobeys. He must submit the document to the inspection of the court, but if it will tend to criminate him it can not be used. (See authorities before cited and Mitchell's case, 12 Abb. Pr. 258.) But aside from the constitution and the reason for the adoption of the provision under consideration, there is an additional reason why, in my opinion, the construction given by the court is incorrect. Judge Cooley, in his excellent work on Const. Limitations, says: "A constitution is not the beginning of a community nor the origin of private rights; it is not the fountain of law nor the incipient state of government; it is not the cause, but consequence, of personal and political freedom; it grants no rights to the people, but is the creature of their power, the instrument of their convenience." * * * "A written constitution is, in every instance, a limitation upon the powers of government in the hands of agents; for there never was a written republican constitution which delegated to functionaries all the latent powers which lie dormant in every nation, and are boundless in extent and incapable of definition." (Marg. p. 37, 3d ed.) It is common to insert in constitutions, as a matter of extraordinary though probably useless precaution, a provision that the enumeration of rights therein shall not be construed to impair or deny others retained by the people.

Mr. Cooley says, also (Marg. p. 61), that * * * "the constitutions are to be construed in the light of the common law, and of the fact that its rules are still left in force. By this we do not mean that the common law is to control the

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constitution, or that the latter is to be warped and perverted in its meaning in order that no inroads, or as few as possible, may be made in the system of common law rules, but only that for its definitions we are to draw from that great fountain, and that in judging what it means we are to keep in mind that it is not the beginning of law for the state, but that it assumes the existence of a well-understood system, which is still to remain in force and be administered, but under such limitations and restrictions as that instrument imposes."

Can there be any doubt that, under the common law, no person was compelled either to accuse himself or to criminate himself?

In *State v. Quarles*, 13 Ark. 311, in commenting upon the constitutional provision, that "no person in a criminal case should be compelled to give evidence against himself," the court uses this language: "The privilege in question, in its greatest scope, as allowed by common law, and no one, be he witness or accused, can pretend to claim it beyond its scope of common law, never did contemplate that the witness might not be proved guilty of the very crime about which he may be called to testify; but only that the witness should not be compelled to produce the evidence to prove himself guilty of that crime. His privilege, therefore, was not an exemption from the consequences of a crime that he might have committed, but only an exemption from the necessity of producing the evidence to establish his own crime."

In *Emery's case*, 107 Massachusetts, 181, the court says, in relation to a provision similar to that in our constitution: "The principle applies equally to any compulsory disclosure of guilt by the offender himself, whether sought directly as the object of the inquiry, or indirectly and incidentally for the purpose of establishing facts involved in an issue between other parties. * * * This branch of the constitutional exemption corresponds with the common law maxim, *nemo tenetur seipsum accusare*, the interpretation and application of which has always been in accordance with what has just been stated."

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In *Mitchell's case*, 12 Abb. Pr. 258, it is said: "The principle of exemption was applied in its broadest extent to parties to actions at law, who could not be compelled to give evidence; and in respect to the production of documentary testimony, as a party to the action was not bound to give evidence, he could not be required to produce papers to be used against him as evidence." And so, in *Latimer v. Alexander*, 14 Ga. 259, this language appears: "The constitution declares that no person shall be compelled, in any criminal case, to be a witness against himself. Literally the constitution does not go as far as the common law, but its spirit and intent cover the whole ground. By it all persons are protected from furnishing evidence against themselves which may tend to subject them to criminal prosecution." And in *Wilkins v. Malone*, 14 Ind. 156: "The constitutional provision in question is thoroughly interwoven with the history and principles of the common law. It exempts no one from the consequences of a crime committed, but only from the necessity of himself producing the evidence to establish it. 'It is founded upon the general sense of enlightened man, that compulsory self-accusation of crime is not only at war with the true charities of religion, but has been proved to be impolitic by the truths of history and the experience of common life.'" I think the construction placed upon this clause of our constitution so limits the practical effects and benefits to be derived therefrom, that in this case the defendant will be deprived of a right guaranteed to him by the spirit and letter of the constitution and common law, and as a result many a defendant may be compelled to criminate himself as completely as would be the case if he should be compelled to utter words establishing his guilt. I am satisfied that the framers of that instrument and the people who adopted it did not intend that a principle which has so long excited the admiration of the most enlightened nations, and been regarded as one of the grandest monuments of liberty and humanity, should be disregarded or forgotten in the administration of criminal law. I am also unwilling to admit that the people of this state have embodied in their

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fundamental law a principle against which, in darker periods, less enlightened people have hurled their righteous anathemas. I think, also, the court is in error in deciding the case upon the constitutional provision without reference to the common law, if such a construction must be placed upon the constitutional provision under consideration.

It is undoubtedly true, as stated by the court, that a fact tending to show guilt may be proved, although it was brought to light by reason of a declaration or confession inadmissible *per se*, as having been obtained by improper influences. (1 Greenleaf's Ev., sec. 231; *State v. Garrett*, 71 N. C. 87.) Voluntary confessions are received in evidence, no matter where made, because it is presumed that persons accused of crime will not confess against their own interest, unless the confessions are true. Involuntary confessions, or those induced by some fear of personal injury or hope of personal benefit, at least by those in authority, are not received, because they cannot be depended upon as the truth. "A free and voluntary confession," says Eyre, C. B., "is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it, and therefore it is rejected." (Greenleaf on Ev., vol. 1, 248.) Facts ascertained from an involuntary confession are received as evidence of guilt, because, although the confession alone could not be taken as true, yet the fact resulting therefrom cannot be false. But involuntary confessions made out of court are not rejected because of the constitutional provision under consideration. (See same vol. Greenleaf's Ev. p. 242 *et seq.*) This rule of law was established long before the constitution of the United States was adopted, and it does not depend upon any constitution for its existence or continuance. Such confessions are excluded upon the theory that the promises, threats or inducements held out, so overcome the mind of the accused that he is liable to speak falsely. Consequently they are excluded,

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although they may oftentimes be entirely true. That is the reason, and the only one, why involuntary confessions made elsewhere than before a tribunal authorized by law to act in the premises, are rejected. If such confessions could be depended upon as the truth, they would be received the same as facts resulting therefrom, or as confessions voluntarily given. If they could be depended upon as the truth, courts would then refuse to inquire how they were obtained, as now they refuse to inquire how facts resulting from an involuntary confession were obtained. So, answering questions propounded by the court, my opinion is that the force of the constitutional provision is limited to the acts of some court, commission, legislature, or body created by and responsible to the law, having power to make inquiries or decide issues, or to take and preserve evidence for such purposes. I have no hesitation in expressing an opinion that this provision does not cover, or intend to cover, or apply to, the acts of persons who are responsible to the law, but for whose acts the law is not responsible.

In *Emery's case*, *supra*, the first question raised was, whether the constitutional privilege of exemption relied on was applicable to investigations ordered and conducted by the legislature, or either of its branches. In its decision the court said: "By the narrowest construction, this prohibition extends to all investigations of an inquisitorial nature instituted for the purpose of discovering crime, or the perpetrators of crime, by putting suspected parties upon their examination in respect thereto, in any manner, although not in the course of any pending prosecution. But it is not even thus limited. The principle applies equally to any compulsory disclosure of his guilt by the offender himself, whether sought directly as the object of the inquiry, or indirectly and incidentally, for the purpose of establishing facts involved in an issue between other parties." (107 Mass. 181.) In *Doe dem. Earl of Egremont v. Date*, 43 E. C. L. R. 892, I find a remark from Lord Denman, C. J., which, although *obiter*, is entitled to some consideration, at least. He says: "A party to a suit has a right to insist that no evidence shall be produced against him, except

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such as can be given legally. Now, if a witness be compelled by the judge at *nisi prius* to produce a title deed which he is legally entitled to withhold, it strikes me that the party to the suit against whom the evidence is produced is affected by that which ought not to have been laid before the jury. One sees that such a question might become of the utmost importance in criminal cases. I consider the authority which the judge exercises to differ materially from that exercised by persons for whom the law is not strictly responsible."

It is undoubtedly true that the evident intent and spirit of the constitution upon this subject is in harmony with the common law; but I have endeavored to show that the protection given to accused persons does not necessarily depend upon the constitutional provision. Several of the states, as we have seen, have no such provision, and yet the common law rule is the same there as here, if in force, and protects all persons from criminating themselves against their will. At a criminal trial, courts cannot take notice of the manner of obtaining evidence out of court. If it is competent and pertinent to the issue, it will be received. If it is a forced confession alone, it will not be admitted in evidence for the reason stated above. If the confession has led to a fact that cannot be false, it will be received for that reason; but I insist that the same rule does not obtain in court, in relation to facts there disclosed by an involuntary confession, or by any compulsory disclosure tending to criminate the defendant. Suppose the proof in this case had been that defendant killed some human being, and that he had voluntarily told another Chinaman that he killed Ah Tong and buried him, without stating the place of burial; that the state, having been fearful that the jury would not believe the Chinese witness, asked the court to order the defendant to go with the sheriff and point out the body; that the court so ordered, and, against defendant's consent, compelled him to obey; that the body was pointed out, that fact having been testified to by the sheriff, and the defendant convicted. If the body had not been found, it would have been error, because the compulsion might have

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prejudiced the minds of the jury against the defendant. But, inasmuch as it was found, I am unable to perceive, from the theory of the court, why such practice would not have been proper, because the result—the fact found—could not have been false, and it would have tended to prove the confession true.

Suppose, again, that a person is accused of stealing a gold bar. The defendant goes upon his trial before it is found. The state proves the larceny and many facts tending to show defendant's guilt. A witness testifies to facts showing almost, but not quite, conclusively, that defendant has the bullion concealed about his premises. Thereupon, at the request of the district attorney, the court states to the defendant that there has been testimony concerning his possession of the bullion, but of the fact he neither has an opinion nor expresses any; that he will instruct the jury that the order he is about to make is no indication that he considers the defendant guilty, and that they must so consider it. Thereupon the court says to the defendant: "If you have the bullion, and will point it out and deliver it to the sheriff, I will give you a light sentence in case you are convicted; and if you will not do so, should the jury find you guilty, I will give you the full punishment allowed by law." The defendant delivers the bullion to the sheriff, the jury is charged as promised, and a conviction follows. Is there any doubt that such conduct on the part of the court would be error? Still, in neither of the supposed cases is the defendant required to speak or testify, and in both there is no opportunity or object to falsify. The finding of the body and the bullion tell their own tales. In both cases hope and fear may have induced the confession or discovery, but in both the discovery shows evidence of guilt which can not be falsified or simulated.

If witness Rhoades had testified that he knew the defendant was Ah Chuey, because he was a good English writer and had for years kept a diary; that he wrote in it every day and signed his name, "Ah Chuey," to each entry; that he saw the book a few minutes before coming into court; that defendant then had the book upon his person,

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would any one say that the court, without error, could have compelled him to show the book to the jury? And yet, why not on principle, if he could be compelled to exhibit a private, harmless mark for the same purpose? The object would have been to ascertain the truth, and the result would have verified the statement. Suppose, instead of the head and bust of a woman, he had written upon his breast, in India ink, the words, "I am Ah Chuey;" why could those words be shown with more propriety than the words in the diary, and could they not have been shown if it was proper to compel him to exhibit the mark?

In *Commonwealth v. Dana*, 2 Met. 337, the defendant was indicted for an alleged violation of the statute prohibiting the sale of lottery tickets, or the possession of the same with intent to sell, or to offer them for sale, or the aiding and assisting in any such sale. In support of the issue joined in the case, the commonwealth offered in evidence the copy of a search warrant issued from the police court, to the admission of which defendant objected on the ground that the same had been issued improvidently and was void in law. I quote a part of the decision:

"Again, it has been urged that the seizure of the lottery tickets and material for a lottery, for the purpose of using them as evidence against the defendant, is virtually compelling him to furnish evidence against himself, in violation of another article in the declaration of rights. But the right of search and seizure does not depend on the question whether the papers or property seized were intended to be used in evidence against the offender or not. The possession of lottery tickets with the intent to sell them was a violation of law. The defendant's possession, therefore, was unlawful, and the tickets were liable to seizure as belonging to the *corpus delicti*, or for the purpose of preventing any further violation of law. * * * There is another conclusive answer to all these objections. Admitting that the lottery tickets were illegally seized, still this is no legal objection to the admission of them in evidence. If the search warrant was illegal, or if the officer serving the warrant exceeded his authority, the party on whose

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complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence, if they were pertinent to the issue, as they unquestionably were. When papers are offered in evidence the court can take no notice how they were obtained, whether lawfully or unlawfully, nor would they form a collateral issue to determine that question. This point was decided in the cases of *Legatt v. Tollervy*, 14 East. 302, and *Jordan v. Lewis*, 14 East. 306, note; and we are entirely satisfied that the principle on which these cases were decided is sound and well established." Mr. Greenleaf lays down the same doctrine in his work on evidence.

The rule that I contend for does not, in its practical application, depend upon the length of hair, the style of the shirt collar, or any other peculiarity of dress. "In cases of felony, where the prisoner's life or liberty is in peril, he has the right to be present, and must be present, during the whole of the trial and until the final judgment. If he be absent, either in prison or by escape, there is a want of jurisdiction over the person, and the court cannot proceed with the trial or receive the verdict or pronounce the final judgment." (Cooley's Cons. Lim. 318; *State v. Johnson*, 67 N. C. 59.)

Had the identifying mark been upon some portion of the body not concealed, and had the jury seen it by reason of the defendant's presence in court, I do not say they could not have acted upon the fact so observed. What I say is, that whether the mark is concealed or not, the court can not compel a defendant, for the purpose of identification, or any other, the tendency of which is to criminate, to exhibit himself or any part of himself before the jury as a link in the chain of evidence.

An accused person can not be compelled to discover a fact while on trial, nor can he be compelled to be an unwilling instrument of discovery or proof after the discovery has been made by other evidence. He may refuse to plead even, and instead of making such refusal evidence of guilt the law provides that the plea of "not guilty" shall be en-

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tered. Had the defendant been accused of a misdemeanor only, his presence in court would have been unnecessary. Under such circumstances, had he elected to remain absent from the trial, I have no hesitation in expressing an opinion that it would have been error had the court caused the sheriff to bring him into court against his will, and there exhibit the mark; nor do I think the fact that he was required to be present in court in any manner abridged the right which he would otherwise have had.

But few decided cases have been found by counsel, the court, or myself, wherein the question involved in this case has been decided directly, but all that have come under my notice sustain the conclusion to which I have arrived and endeavored to express. The first case is *State v. Jacobs*, referred to by the court. In commenting upon that case, the court says it was decided upon two grounds, the second of which was that "the manner in which the defendant was compelled to exhibit himself was prejudicial to the defendant." It is not apparent from the decision that the defendant was treated indecorously or in any way prejudicial to his case, except that he was compelled to go before the jury and submit to their inspection. This is what that court said in relation to the manner: "Another argument of more weight is that the testimony when afforded to the jury is not incompetent, though it might have been an act of tyranny in the court to compel it. But this argument proves too much, and would be equally available if admitted in favor of the competency of a deed, or other private paper, which the court might wrongfully have compelled a defendant to produce. Surely, in such a case, the manner in which the deed or paper was produced and offered would be error, although the deed or paper, if fairly brought before the jury, would be competent evidence." I submit that the "manner" spoken of by the court referred only to the fact that the defendant was compelled to exhibit himself, and thus furnish evidence against himself; that proof of his *status* as a free negro, by him, was incompetent, while if the same fact had been proven by other persons who knew him, such proof would have been competent. If such is the case, then the

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second ground of reversal stated by the court was only stating the first ground in a different way. In my opinion the only point decided in that case was that it was error to compel the defendant to exhibit himself before the jury for the purpose of showing that he was a negro. The next case is the *State v. Johnson*, 67 N. C. 57. The indictment charged Johnson, a colored man, with ravishing Susan Thompson. When she was on the stand as a witness for the state she was asked by the solicitor to look around the courtroom and see if she could see the man who committed the rape on her. She pointed to the defendant and said, "That is the black rascal." It was insisted by the defendant's counsel that this was making the prisoner furnish evidence against himself. The court say: "In support of his objection the prisoner relied upon *State v. Jacobs*, in which it was decided that the defendant could not be compelled to exhibit himself to the jury that they might see whether he was within the prohibited degree of color. But that case is not like this. There he was compelled to exhibit himself to the jury, that the jury might determine, by inspection, his quality and condition, his blood or race. That was a matter to be proved by the oath of witnesses who knew the facts, or, it may be, by experts. And although the defendant could not be compelled to exhibit himself to the jury, yet it would be competent for witnesses who knew him to speak of his color and of any facts within their knowledge, and to point to him as being the identical person of whom they were speaking." Suppose it was a matter to be proved by the oath of witnesses or by experts. Was it any the less error to compel the defendant to exhibit himself to the jury and supply the place of other witnesses? It will be noticed that in Johnson's case the court reiterates what was decided in the Jacobs case, that "defendant could not be compelled to exhibit himself to the jury."

The next case is *State v. Woodruff*, 67 N. C. 90. In that case, as in Johnson's, I draw attention to the fact that the defendant was not exhibited before the jury. He sat in his place, as he had a right, and was obliged, to do. The bastard child was exhibited, or rather held in its mother's arms

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while she was testifying, and in his address to the jury the solicitor called attention to the child's features and commented upon its appearance, the child being still before the jury. I have nothing additional to add in relation to the right of the state to have the defendant accused of felony present in court, and the right of the jury to observe him while there; and in case of misdemeanor the right is the same if he voluntarily appears in court. Certainly the solicitor had the right to call the attention of the jury to the child's features, and that was all he did do. At any rate, the defendant was not disturbed in any manner, and if the jury gathered any additional information as to his appearance, it was the result of necessity in giving him his constitutional right to be present in court; it was not the result of compulsion by the court. Besides, if, in truth, in the Jacobs case, it did no good or harm to parade him before the jury, if they discovered nothing but what they knew before he was exhibited, still those facts would not have changed the result in the appellate court. That court could not have known that the error, if such it was, was harmless.

"It is the capability of abuse, and not the probability of it, which is to be regarded in judging of the reasons which lie at the foundation, and guide in the interpretation, of such constitutional restrictions." (Emery's Case, 107 Mass. 183).

To show that the court in Woodruff's case recognized the distinction that I am endeavoring to make between exhibiting the defendant, as was done in the Jacobs case, and allowing him to sit undisturbed in the presence of the jury, as was done in the Woodruff case, and to show by implication that the court still adhered to the opinion in the Jacobs case, I quote a few lines from the decision: "*The State v. Jacobs* has been argued as an authority to show error in this case, as if the court had ordered the defendant to stand up and exhibit himself before the jury, as was done in Jacobs' case. But the record shows no such thing, and, therefore, the argument founded on that supposition fails."

The State v. Garrett is the next case. The fact is not that the defendant was compelled to unwrap her hand and

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exhibit it to a physician before the coroner's jury, as such, although it was done in their presence. The jury had rendered their verdict against her before she was compelled to show her hand. Whether she could have been compelled to exhibit her hand while the jury were acting, and before their verdict, is not in the case, and that fact, at least, must appear before it can be claimed that the Garrett case should have been governed by the controlling principle enunciated in the Jacobs case. Compelling the defendant to show her hand after the verdict against her, did not change the verdict, and the effect of a disclosure at that time, and under such circumstances, was the same as though it had been compelled by any of the spectators present. At the trial the defendant objected to evidence as to the condition of her hand, and relied upon the Jacobs case. The court said: "The distinction between that and our case is, that in Jacobs' case, the prisoner himself, on trial, was compelled to exhibit himself to the jury, that they might see that he was within the prohibited degree of color, thus he was forced to become a witness against himself. This was held to be error. In our case, not the prisoner, but the *witnesses*, were called to prove what they saw upon inspecting the prisoner's hand, although that inspection was obtained by intimidation."

The Stokes case is the next. There the court said: "In the presence of the jury the defendant was asked to make evidence against himself;" that is, he was asked to take off his boot and make a new track to be compared with the one found near the scene of crime. I am unable to perceive how it would have been less erroneous to have asked him, in the presence of the jury, to place his foot in the track already made, or to take off his boot and show his bare foot for the same purpose. In either case the defendant would have been asked to furnish a factor necessary in arriving at a conclusion whether or not his foot made the track found near the place of homicide, and inferentially, whether or not he was the guilty party. The method adopted might have been more convincing to the jury than either of the

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others mentioned had the court held it proper, but I fail to see how it was more erroneous.

I find nothing in the quotation made by the court from Story and Blackstone against the views I entertain. Judge Story says the insertion of this clause "is but an affirmance of the common law privilege;" that it was adopted to prevent the evils which had resulted from the custom of other countries in compelling criminals to give evidence against themselves, and of being subjected to the rack or torture in order to procure a confession. A part of the object then was to prevent the giving of compulsory evidence. Surely, that is not confined to testimony or statements coming from the mouths of witnesses or accused persons. As to Hoag's case, referred to by the court, it is enough to say that it is evident from the text that his foot was exhibited to the jury by the defendant himself. Besides, the result was entirely in his favor and he was acquitted. Mr. Burrill does not intimate, nor does any other text writer, so far as I am able to find, that it would have been competent for the state to have compelled the prisoner to show his foot in court in aid of the prosecution. If the law of New York had not allowed Hoag to testify in his own behalf, and had the law been the same in this state at the time of the defendant's trial, I agree with the court that at his own request, the first could have exhibited his foot, and the last his arm, to the jury. But my conclusions from those facts are very different from those arrived at by the court. The reason why they would have been allowed to do so is because the reasons for the law's exclusion of testimony would not have existed in relation to proofs offered by them independently of their testimony. Self-interest might have prompted them to commit perjury if allowed to testify; hence, under the old rule, they would have been excluded as witnesses. But as to physical peculiarities, the reason of the rule, and hence the rule itself, would have failed. I am unable to understand why the constitutional provision, that "no person shall be compelled to be a witness against himself in a criminal case," should be construed as relating solely to testimony given, or a statement made by him, because,

Argument for Appellant.

under a law not allowing him to testify, he may exhibit himself for the purpose of proving a physical peculiarity independently of any testimony.

My conclusion is that under both the constitution and the common law, it was error to compel the defendant, at the trial, to make a disclosure which, with the testimony of witnesses, tended to prove him to be Ah Chuey, and indirectly to establish his guilt. I think the error is as great as it would have been had the court compelled the defendant to admit that he was Ah Chuey. It accomplished the same result. In criminal cases the state must prove guilt without the aid of the accused at the trial, unless the guaranteed rights are waived, when a waiver is permissible.

I therefore dissent from the opinion of the court.

[No. 927.]

OSCAR ALLEN, RESPONDENT, v. JAMES MAYBERRY,
APPELLANT.

SUFFICIENCY OF SHERIFF'S RETURN—CLERICAL MISTAKE.—Where the sheriff made return that he personally served the summons upon James Mayberry, and further certified that he "delivered to the said Jame May a certified copy of the complaint, etc.:" *Held*, that the word "said" preceding the words "Jame May," shows that they were written by mistake for James Mayberry, and that the return is sufficient.

APPEAL TAKEN FOR DELAY—RULE AS TO DAMAGES ENFORCED.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts are stated in the opinion.

Boardman & Varian, for Appellant.

I. By the return of the officer it *affirmatively* appears that a certified copy of the complaint was not served on appellant. The statute specially provides how service shall be made. (Civ. Pr. Act, secs. 28, 29.) These provisions were not complied with, hence there is no presumption in favor of the jurisdiction. (*O'Brien v. Shaw's Flat Co.*, 10 Cal. 343; *Aiken v. Quartz Rock M. G. M. Co.*, 6 Cal.

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186; *McMillan v. Reynolds*, 11 Id. 378; *McMinn v. Whelan*, 27 Id. 312; *Forbes v. Hyde*, 31 Id. 348; *McKinlay v. Tuttle*, 42 Id. 577.

Thomas E. Haydon, for Respondent.

I. The return of the officer was sufficient.

II. Judgments are only reversed for material errors. (*Quint & Hardy v. Ophir S. M. Co.*, 4 Nev. 308; Pr. Act, sec. 11; Comp. Laws, 1134.) Errors will not be *presumed*. (*People v. Best*, 39 Cal. 690; *Moore v. Massini*, 43 Cal. 389.) The error, if any, should have been brought to the attention of the court below. (*Howard v. Richards*, 2 Nev. 133; *Abel Guy v. Ed. Franklin*, 5 Cal. 417.) Defendant has not shown that the complaint and summons were not served. (*Moore v. Massini*, 43 Cal. 389, *supra*.)

By the Court, BEATTY, C. J.:

The defendant in this case appeals from a judgment rendered against him upon his default, and the only question to be considered is whether the sheriff's return shows that he was served with a certified copy of the complaint.

The following is a copy of the return:

“STATE OF NEVADA, COUNTY OF WASHOE, ss.

Sheriff's return.

“I hereby certify and return that I received the within summons on the eleventh day of May, A. D. 1878, and that I personally served the same upon the within named defendant, James Mayberry, by showing the original summons to him and delivering to him a copy of the same, in Washoe county, State of Nevada, on the eleventh day of May, A. D. 1878. And I further certify that I delivered to the said Jame May (*sic*) a certified copy of the complaint filed in said action, with a copy of the summons attached, at the same time and place. Dated this eleventh day of May, A. D. 1878.

A. K. LAMB,

“Sheriff of Washoe county, State of Nevada.

“By I. CHAMBERLAIN, Deputy Sheriff.”

This shows clearly that the defendant was served with a certified copy of the complaint. The word “said” preceding the words “Jame May” shows that they were

Argument for Petitioner.

written by mistake for James Mayberry, he being the only person to whom the word "said" could possibly refer. The whole context proves the same thing too conclusively to admit of a moment's doubt.

The appeal was manifestly taken for delay, and the judgment must be affirmed with damages. (*Wheeler v. Floral M. and M. Co.*, 10 Nev. 203; *Escere v. Torre*, decided at the present term.)

The judgment is affirmed, with ten per cent damages in addition to costs and accruing interest.

[No. 965.]

THE STATE OF NEVADA, EX REL. F. L. AUDE, RELATOR, v. JOHN H. KINKEAD, RESPONDENT.

DISTRICT JUDGES—ART. VI. SECTION 5 OF THE CONSTITUTION CONSTRUED.—

In construing this provision of the constitution: *Held*, that the legislature had the power to reduce the number of district judges in the first judicial district.

IDEM—STATUTE CONSTRUED.—*Held*, that since the passage of the act of February 27, 1866 (Stat. 1866, 140, sec. 1), the first judicial district has been entitled to but one judge.

PETITION for mandamus.

The facts appear in the opinion.

Wells & Stewart, for Petitioner:

I. Petitioner bases his claim to a commission, and his right to hold said office of district judge of the first judicial district, upon the provisions of sec. 5, art. 6, of the constitution; and claims that all legislation intended to deprive said district of three district judges, is unconstitutional and void, under said sec. 5, art. 6, and that, therefore, his said election was regular and legal. The districting of the state in the constitution was had, in order that the judicial part of the machinery of the state government might be put in motion before it could be done by the legislature. This is obvious from the language used, and the time fixed by the section for the first district judge elected under it, to go

14 117
15 258
19 337
10* 908
19 341
10* 903

Argument for Petitioner.

into office the first Monday in December, 1864, and one week before the first meeting of the legislature under the constitution. But the next thing provided for by the framers of the constitution, after districting the whole state, was to provide means whereby that districting should not remain perpetual, but might be changed, from time to time, as the convenience of the public and the proper dispatch of business might require. Hence, this phrase was next put into the section, to wit: "The legislature may, however, provide by law for an alteration in the boundaries or divisions of the district herein provided, and also for increasing or diminishing the number of the judicial districts and judges therein." We claim that two separate and distinct propositions are contained in this sentence, to wit: 1. The power is given to retain the original nine districts, and to rebound or re-divide them, if desired by the legislature, in such way as to better subserve the business necessities and convenience of the public; and, 2. The power is given to re-district the entire state, and make of it just as many districts more or less than nine, as should be deemed necessary and convenient, so as not to affect a then incumbent of the office of district judge. But it is plain and logically indisputable, that in the exercise of the second power granted in this sentence, the legislature must, if it increase or diminish the number of judicial districts, also increase or diminish the number of judges.

II. The letter of a constitutional provision should never be interfered with, except when entirely free from doubt as to the construction given; and if the point be one involving public policy only, no equitable construction is permissible. (Sedg. on S. & Con. Law, 19 and 370 and note, 248, 251, 263, *et seq.*; Smith's Com. 831 *et seq.*) Every clause in a section of law, statutory or constitutional, must, if possible, have some effect. (Sedg. 200 and note; Smith's Com. 710; 1 Bibb. 210.)

III. The act of 1866, reducing the number of judges in the first district, is unconstitutional and void. (Sedg. 411 and note, also, 180-182; 3 Coms. 547-568.) As to purview and proviso: Sedg. 45 and 49 and note; 10 Peters, 449;

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10 Wheaton 1 and 30; 2 Darris on Stat. 515; Smith's Com. 709 *et seq.*, and 712.

IV. Where a constitution takes away the power from the legislature to pass laws on a given subject, this is a repeal of existing laws on that subject. (Sedg. 555, 556; 4 Scann. 344; 4 Nev. 472.)

M. A. Murphy, Attorney-General, for Respondent, cites the following authorities: Sedg. on Cons. Law, 244, 409, 413; Cooley's Cons. Lim. 54, 58; 7 Md. 135; 54 Penn. St. 255; 49 N. Y. 284; 24 N. Y. 488; 41 Cal. 147.

By the Court, BEATTY, C. J.:

It is the official duty of the respondent, as governor, to issue commissions to those who are elected to the office of district judge. The petitioner claims to have been elected a judge of the first district at the last general election, but the respondent refuses to grant him a commission, and this proceeding has been instituted for the purpose of compelling him to do so. Respondent demurs to the petition for mandamus, and the question is whether, upon the facts alleged, the petitioner is entitled to the writ.

It appears that at the general election, held on the fifth of November, 1878, the petitioner and the Hon. Richard Rising were the only persons voted for for the office of district judge of the first district; that they were both eligible to the office; that Judge Rising received the highest number of votes and petitioner the next highest. The election of Judge Rising is conceded, but the petitioner contends that, under the Constitution of the State, the first district is entitled to three judges, and consequently that he also was elected. The respondent claims that the provision of the constitution giving three judges to the first district was intended to be a merely temporary arrangement; that it was within the power of the legislature to reduce the number, and that, since the passage of the act of February 27, 1866 (Stat. 1866, pp. 139, 140, sec. 1), the first district has been entitled to but one judge. The petitioner insists that the act referred to is unconstitutional, and that, notwith-

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standing its passage by the legislature, the original provision of the constitution is still in force.

The question to be decided, therefore, resolves itself into this: Could the legislature reduce the number of judges in the first district? This depends upon the proper construction of sec. 5 of art. VI. of the constitution, which is as follows:

“Sec. 5. The state is hereby divided into nine judicial districts, of which the county of Storey shall constitute the first, the county of Ormsby the second. * * * The legislature may, however, provide by law for an alteration in the boundaries or divisions of the districts herein prescribed and also for increasing or diminishing the number of the judicial districts and judges therein. But no such change shall take effect, except in case of a vacancy, or the expiration of the term of an incumbent of the office. At the first general election under this constitution there shall be elected in each of the respective districts (except as in this section hereafter otherwise provided), one district judge, who shall hold office from and including the first Monday of December, A. D. 1864, and until the first Monday of January, in the year 1867; after the said first election there shall be elected at the general election which immediately precedes the expiration of the term of his predecessor, one district judge in each of the respective judicial districts (except in the first district, as in this section hereinafter provided). The district judges shall be elected by the qualified electors of their respective districts, and shall hold office for the term of four years (excepting those elected at said first election) from and including the first Monday of January next succeeding their election and qualification; *provided*, that the first judicial district shall be entitled to, and shall have, three district judges, who shall possess coextensive and concurrent jurisdiction and who shall be elected at the same times, in the same manner, and shall hold office for the like terms, as herein prescribed in relation to the judges in other judicial districts. * * *

In accordance with the provisions of this section, three

judges were elected for the first district at the first election under the constitution in November, 1864. Their term expired on the first Monday of January, 1867. To succeed them but one judge was elected in November, 1866, and but one was elected in 1870 and in 1874, the general understanding being that the act of February, 1866, above cited, reducing the number of judges in that district to one, was entirely valid. Undoubtedly the same understanding prevailed at the recent election, and but one judge was really voted for.

There is a strong presumption in favor of the constitutionality of a law passed almost contemporaneously with the adoption of the constitution, and so long and so universally acquiesced in. No court would be justified in declaring such a law invalid unless forced to do so by the most cogent and conclusive reasoning. The argument in behalf of petitioner, though elaborate and very ingenious, is still far from convincing. Its fundamental fault is that it attempts, by the application of narrow and technical rules of statutory construction, to wrest the provisions of the constitution above quoted from their obvious meaning. We shall not attempt to follow the argument in detail, or to notice particularly the various propositions upon which it is based. It will be sufficient to state our own construction of the clauses in question, and the reasons which we think are sufficient to sustain our conclusions.

In the first place, there can be no doubt as to the fact that it was the intention of the framers of the constitution to empower the legislature to reduce the number of judges in the first district. This is sufficiently proved by the debates in the constitutional convention (650, 651, 713, *passim*). If further proof were necessary, it is afforded by the circumstances in view of which the convention acted. The condition of the country at that time was such as to forbid any other than a provisional arrangement as to the number of judges to be assigned to the respective districts. In Storey county there was such an immense accumulation of old business as to require for a time an extra number of judges, but it was foreseen that as soon as the old docket

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was cleared off the number might be conveniently reduced. In no other county of the State was more than one judge required at that time, but it was natural to anticipate that at some future time the state of affairs prevailing along the Comstock might find its parallel in other localities and render it necessary to increase the number of judges in other districts.

In view of these facts there is no reason for taking the following language in any other than a literal sense: "The legislature may, however, provide by law for an alteration in the boundaries or divisions of the districts herein prescribed, and also for increasing or diminishing the number of the judicial districts and judges therein." This means that the legislature may increase or diminish the number of judges in the respective districts, and not, as petitioner contends, that the number of judges in the State may be incidentally increased or diminished by increasing or diminishing the number of districts. Besides being opposed to the natural import of the language of the constitution, this interpretation violates a cardinal rule of construction; it renders the words "and judges therein" meaningless and superfluous. For if the proposition upon which the whole argument of the petitioner rests is true—that is, that it has been established by the constitution, that, so long as it endures, the first district must have three judges, and every other district one, and only one judge—then the power to increase or diminish the number of the districts necessarily included the power to increase or diminish the number of judges in the state, and the sentence without the words "and judges therein" meant exactly as much as it is contended it means with them. We repeat, therefore, that the legislature was empowered to increase or diminish the number of the judges originally assigned to the respective districts, as provisionally organized by the constitutional convention; and we see no difficulty in answering any of the special reasons urged by the petitioner against this construction.

The proviso to section 7, article VI, which allows the legislature to designate other places than the county seat

Points decided.

for holding court in case a county should be divided into two or more districts, does not prove, it has no tendency to prove, that the convention intended to deprive the legislature of the power to assign more than one judge to a district. That was a provision for the benefit of counties of large area, with populations gathered about different centers. It could have no application to a small county with its whole population at the county seat.

Again, the power to "diminish" the number of judges in the respective districts is not a power to entirely deprive a district of any judge; it does not apply where a district has but one judge. To diminish means to make less, not to utterly wipe out.

It is true also that our conclusion involves the admission that the legislature might "in its caprice" (if it can be presumed ever to act from caprice) assign a hundred judges to one district; but the fact that a power is capable of abuse is no argument against its existence. Power must be reposed somewhere, and wherever it is lodged it may be abused. No people could live under a constitution which denied to its functionaries every power that could possibly be misemployed.

The petition for a mandamus is dismissed.

[No. 912.]

**THE COUNTY OF WASHOE, RESPONDENT, v. THE
COUNTY OF HUMBOLDT, APPELLANT.**

TRANSFER OF CRIMINAL CASES—IRREGULARITY IN PAYMENT OF CLAIMS.—

Where a criminal case is transferred from one county to another, the former is liable for all costs and expenses incurred in the trial of said cause, and it cannot complain of any mere irregularity in the mode of paying the expenses, in the first instance, by the latter county. [Beatty, J., dissenting in part.]

IDEM—ILLEGAL FEES.—The county from which the cause was transferred has the right to show that the services charged for were never rendered, or that the fees charged are unauthorized by the statute.

FEES OF OFFICERS.—Officers can only demand such fees as the law has fixed and authorized for the performance of their official duties.

ATTORNEYS' FEES—CONSTRUCTION OF STATUTE.—In construing the statute

Statement of Facts.

approved March 5, 1875 (Stat. 1875, 42), relative to attorneys' fees in criminal cases: *Held*, that an attorney who defends a prisoner under appointment by the court, is entitled to a fee not exceeding fifty dollars for each trial of the cause, in whatever county the case may be tried, and an additional fee, not exceeding fifty dollars, if the case is followed into the supreme court.

ALLOWANCE OF FEES FOR SUMMONING JURY—WHEN PROPER.—The county from which a criminal case is transferred is liable for the fees of the sheriff in summoning a jury upon a special venire for that particular case.

SHERIFFS' FEES—SUMMONING A JURY—MILEAGE.—When a venire is issued to a sheriff for thirty jurors, and he finds only twenty-four: *Held*, that he was entitled to his fees "for miles actually traveled in attempting to find and serve jurors whose names appeared upon the venire, but who could not be found and served."

IDEM—TAKING PRISONERS BEFORE COURT.—The sheriff is not entitled to any compensation for bringing the defendant into court during the trial.

IDEM—ATTENDANCE ON COURT.—The sheriff is entitled to five dollars for each day's attendance. He cannot charge extra for a night session.

IDEM—SERVICE OF SUBPENA IN ANOTHER COUNTY.—The sheriff is not authorized by the statute to serve a subpoena upon witnesses residing in any other county, except it is within the same judicial district.

CLERKS' FEES—JURORS' CERTIFICATES.—The clerk is not entitled to any fees from the county, for issuing time checks or certificates to each individual juror.

IDEM—MOTIONS AND ORDERS.—The clerk is only entitled to charge for such motions and orders as are properly entered in the records of the court.

JURORS' FEES—ATTENDANCE FIRST DAY.—The county from which a criminal cause is transferred is properly chargeable for one day's attendance of each juror present on the first day of the trial of the case.

REPORTERS' FEES.—Where the court is authorized to appoint a short-hand reporter, and there is no statute regulating his fees, he is entitled to a reasonable compensation for his services.

SURVEYORS' FEES.—Where it is necessary to have a survey of the premises where the crime was committed, in order to properly present the case to the jury, the county commissioners are authorized to allow a reasonable compensation for such survey.

VERIFICATION OF CLAIMS—UNAUDITED ACCOUNTS—JURISDICTION.—Where the expenses of a criminal trial have been properly audited in the county where the trial was had, it is unnecessary to have the same claims verified and presented as unaudited accounts to the commissioners of the county from which the cause was transferred. [Beatty, J., dissenting.]

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts are stated in the opinion.

Argument for Respondent.

George P. Harding, District Attorney of Humboldt County,
for Appellant.

I. The treasurer of Washoe county had no authority to pay the witness fees. The order for their payment was made by the judge instead of by the court. (1 Comp. L., 2169.)

II. The allowance of attorneys' fee for three hundred dollars was illegal. (Stat. 1875, 142; *Rowe et al. v. Yuba Co.*, 17 Cal. 61.)

III. County commissioners have no jurisdiction to examine, settle, or allow any accounts not legally chargeable against the county. (2 Comp. L., 3077; *People ex rel. Raun et al. v. Supervisors of El Dorado Co.*, 11 Cal. 170; *Robinson v. Supervisors of Sacramento Co.*, 16 Id. 208; *Williams v. Billeman*, 7 Nev. 68.) Their action must appear to be in conformity with the provisions of the law creating and defining their powers and duties. (*Finch v. Supervisors of Tehuma Co.*, 29 Cal. 454; *Linden v. Case*, 46 Id. 171; *State v. Commissioners of Washoe Co.*, 5 Nev. 319; *Swift v. Commissioners of Ormsby Co.*, 6 Id. 97; *Hess v. Commissioners of Washoe Co.*, 6 Id. 109; *State v. C. P. R. R. Co.*, 9 Id. 79; 2 Comp. L., 3078, 3079, 3081, 3093, 3095; *Connor v. Morris*, 23 Cal. 447; *McCormick v. Tuolumne Co.*, 37 Id. 257; *Fox v. Supervisors*, 49 Id. 563; 37 Id. 193.)

Robert M. Clarke, for Respondent.

I. The law makes the officials of plaintiff the agents for the defendant, and in the allowance and payment of all charges and expenses incurred substitutes the plaintiff for defendant, and plaintiff's allowance and payment is in legal effect the allowance and payment by defendant, and binds the defendant, and is conclusive upon it. The authorities of the defendant have nothing to do with the allowance of the claims in the first instance. The original claims are not to be submitted to it and can not be passed upon by it. If the officials of the plaintiff, acting within the scope of their authority, and having jurisdiction to act, have made mistakes or committed errors, such mistakes or errors can not be reviewed by the defendant or by the courts in this form of action.

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Wm. Cain, District Attorney of Washoe County, also for Respondent.

By the Court, HAWLEY, J.:

The case of *The State v. Rover* (indicted for murder) was transferred from the county to Humboldt to the county of Washoe for trial. It was twice tried in Washoe county.

This action was commenced to recover the sum of three thousand six hundred and forty-five dollars and five cents, the amount of indebtedness alleged to have been legally incurred by Washoe county upon the trials of said case. It was tried before the court without a jury and a judgment was rendered in favor of Washoe county in the sum of three thousand five hundred and seventy-three dollars and twenty-five cents.

Several of the items objected to relate exclusively to alleged irregularities in the form and manner of the presentation and allowance of certain claims by the officers of respondent and it becomes material to ascertain, in advance, whether or not appellant can complain of such irregularities, if any exist.

By the transfer of the *Rover* case it became the duty of the respondent to act for appellant, and for all services rendered by any of its officers, or other parties, or costs incurred, relating to the trials of said case, the appellant became liable (1 Comp. Laws, 2300; *ex parte Taylor*, 4 Ind. 479), and it is not in a position to complain that the treasurer of respondent paid certain claims that were informally or irregularly presented to him for payment.

The material questions involved on this appeal are whether the accounts complained of were necessarily incurred during the trials of the *Rover* case and constitute legal charges against appellant, and not whether the treasurer of respondent could or should have objected to the payment of the same because certain orders for the payment of witness fees were indorsed upon the affidavits presented by the witnesses who were entitled to compensation, and were signed "S. H. Wright, District Judge," instead of "being spread upon the minutes of the court," as required by

statute (1 Comp. Laws, 2169, 2170), or because some of the other claims were not indorsed in the manner provided for by the statute.

But appellant is not bound to pay every claim because it was presented to, examined, allowed, and paid by the respondent. It had the right to show, if it could, that the services charged for were never in fact rendered, or that the fees charged were unauthorized by the statute.

There is a preliminary objection against the examination of any of the accounts complained of. There are no findings containing an itemized statement of the disallowed accounts.

In order to have the accounts reviewed by this court appellant ought to have asked for a specific finding as to the particular accounts allowed or disallowed by the district court. (*Young v. Clute*, 12 Nev. 37.)

This objection, however, was not urged by the respondent's counsel, and hence we shall proceed to examine and dispose of all the objections to such accounts as come within the rule above stated.

Prior to such examination it is proper to state, in general terms, that where the accounts depend solely upon the question whether the same are, or are not, reasonable, no argument has been advanced by appellant's counsel which, in our opinion, calls for any reduction of the amounts allowed by the county commissioners of Washoe county.

1. Attorneys' Fees. The language of the second section of the act entitled "An Act to provide for the payment of attorneys in certain cases," approved March 5, 1875 (Stat. 1875, 142), being ambiguous, it becomes our duty to determine the real intention of the legislature.

Section 1 provides that any attorney appointed by the court to defend a prisoner is entitled to "such fee as the court may fix, not to exceed fifty dollars."

Section 2 provides that the attorney so appointed can not "be compelled to follow a case to another county or into the supreme court." But if he does follow the case he "may recover an enlarged compensation, to be graduated on a scale corresponding to the prices allowed."

Now, if this section invests the court with discretionary

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power in fixing the fees to take into consideration the inconvenience and expense resulting from the attorney's absence from his professional duties at home, then the allowances made in this case were reasonable and should not be disturbed. But we are of opinion that it was not the intention of the legislature to invest the courts with any such discretionary power.

Without any action on the part of the legislature, it would be the duty of an attorney appointed by the court to defend the prisoner without any compensation. (*Rowe v. Yuba County*, 17 Cal. 61; *Lamont v. Solano County*, 49 Cal. 158; *Samuels v. The County of Dubuque*, 13 Iowa, 536; *Johnston v. Lewis and Clarke County*, 2 Montana, 159; *Elam v. Johnson*, 48 Ga. 348.)

By the act in question, the legislature very properly made provision for some compensation, but expressly limited the amount to be allowed. By the express terms of the act it is left optional with the attorney to follow the case to another county, or into the supreme court, or to refuse to do so.

We are of opinion that it was the intention of the legislature to provide for the payment of a fee, not exceeding fifty dollars, to every attorney who defends a prisoner charged with crime, under appointment from the court; that an attorney appointed to defend a prisoner charged with any of the offenses specified in section one is entitled to a fee, not exceeding fifty dollars, for defending the case in the county where the prisoner is indicted, and if, after the trial in that county, the cause is transferred to another county, and the attorney thus appointed voluntarily follows the case and defends the prisoner, he would be entitled to an additional compensation, not to exceed the sum of fifty dollars. If the case was thereafter followed to the supreme court, the attorney would be entitled to a further compensation, not to exceed fifty dollars. In other words, the attorney voluntarily following the case stands upon the same footing, so far as the fee is concerned, as any other attorney would who might be appointed by the court in the county to which the case is transferred.

Under the provisions of the statute, he has the right to follow the case and claim the enlarged compensation. If he refuses to follow the case, it would be the duty of the court to appoint some other attorney, who would be entitled to a fee not exceeding fifty dollars.

The only service, therefore, which the second section of the act performs is to give the attorney first appointed the privilege of following the case to another county, or into the supreme court, and claiming the enlarged compensation.

From this construction of the law it follows that Messrs. Bonnifield and Davies were each entitled to a fee, to be fixed by the court, in a sum not exceeding fifty dollars for each trial of the case in Washoe county. The amount allowed in excess thereof is unauthorized by the statute, and must be rejected.

The allowance of twenty-five dollars to T. W. W. Davies for arguing the motion in arrest of judgment is clearly erroneous. The court has no authority, under the provisions of the statute, to fix any fee, except for defending the case, which necessarily includes all the motions to be made therein.

2. Sheriffs' Fees. We are of opinion that the charges made by the sheriff for summoning jurors for the trial of Rover were properly allowed.

We agree with appellant's counsel that it ought not to be charged with the fees of the sheriff for summoning the regular panel of jurors for either term of the court when the Rover case was tried (unless it was the only case to be tried), but no valid reason can be urged why appellant should not be held liable for the sheriff's fees in serving any venire for additional jurors specially required for the trial of the Rover case, and it is only for such services that the charges were made. It is true that the venires did not upon their face purport to have been issued for the Rover case. The law, however, does not require the fact to be stated in any venire that it is issued or made returnable for any particular case. (1 Comp. L. 1054, 1055.) These facts can only be made to appear by the testimony of the officers

having personal knowledge of the same. From the testimony adduced upon the trial of this case, it does affirmatively appear that the additional venires (charged for) were issued specially for and on account of the Rover case. It might be claimed that the fees of the sheriff for such services are not necessarily costs taxable in any particular case. In a literal sense this is correct, but it must be borne in mind that in the ordinary administration of justice the charges for such services, being fixed by statute, must be paid by somebody. If the trials of Rover had occurred in Humboldt county, it would have been compelled to pay for such services, and in the absence of any express statute upon the subject, it affirmatively appearing to our satisfaction that the services were necessarily rendered on account of the Rover case, we think that these charges against the county of Humboldt were, as we have already stated, properly allowed. (*Shawnee County v. Wabaunsee County*, 4 Kansas, 312.)

The members of this court do not agree upon some of the questions concerning the allowance of the claim under discussion, but in the opinion of a majority, the mere fact that the record shows that some of the jurors named in the venire charged for were retained by the court for the trial of other causes at the same term, in which appellant had no interest, does not constitute a sufficient reason to induce the court to reject the claim as being an illegal or improper charge against the county of Humboldt.

On the second trial, the venire placed in the hands of the sheriff called for thirty jurors, and it is claimed that he is only entitled to charge for mileage for twenty-four. The record shows that he found only twenty-four jurors, that he traveled three hundred and ninety-seven miles in serving the twenty-four jurors, and thirty-seven additional miles were charged "for miles actually traveled in attempting to find and serve jurors whose names appeared upon the venire, but who could not be found and served."

The sheriff was entitled to fees and mileage for serving the twenty-four jurors, and in the event of the jurors living in different directions, the statute (Stat. 1875, 147) au-

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thorizes the allowance of mileage whether the jurors named in the venire be found or not. The mileage in such cases is necessarily made in "serving such venire."

The charges made by the sheriff for taking the prisoner before the court were unauthorized by law and must be rejected. It is only in "bringing up a prisoner on *habeas corpus*" that a sheriff is entitled to any compensation for bringing a prisoner before the court. (Stat. 1875, 148.) The charges for attendance on the district court for "one day and night, ten dollars," must be reduced to five dollars each.

The fee bill authorizes the sheriff to charge five dollars for each day's attendance upon the court. He is entitled to the five dollars if he is only detained one minute, and he cannot charge any more if he is kept in attendance for the entire twenty-four hours.

No rule of law is better settled than the one under consideration, that an officer can only demand such fees as the law has fixed and authorized for the performance of his official duties. (*Board of Commissioners of Jay County v. Templer*, 34 Ind. 322; *Crittenden County v. Crump*, 25 Ark. 235; *Massing v. The State*, 14 Wis. 502; *The Town of Carlyle v. Sharp*, 51 Ills. 71; *Briggs v. City of Taunton*, 110 Mass. 423.)

In the opinion of a majority of the members of this court, the fees and mileage of the sheriff for the service of subpoenas upon witnesses residing in Humboldt county ought not to have been allowed.

The statute only provides for the service of process by the sheriff within his county (2 Comp. Laws, 2956) except where another county is attached to the same judicial district. (2 Comp. Laws, 2967.) It provides that "a peace officer must serve within his county or district any subpoena delivered to him for service." (1 Comp. Laws, 2167.) The district court had no authority to order the sheriff of Washoe county to serve the subpoena in the county of Humboldt, that county not being within his judicial district. The statute compels witnesses from other counties to attend the place of trial whenever the judge of the court where the

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cause is to be tried or a justice of the supreme court shall indorse on the subpoena an order for the attendance of witnesses (1 Comp. Laws, 2171); but in such cases the service must be made in the manner pointed out by the other provisions of the statute which we have cited.

It is true, as was argued by respondent's counsel, that it is the duty of the sheriff of every county "to obey all lawful orders and directions of" the district court "in his county," and "to execute the process, writs, or warrants of courts of justice * * * when delivered to him for that purpose." (2 Comp. Laws, 2957.) But the officer is not required to obey any order which is not authorized by law, and although we are convinced that the court in the case under consideration acted in good faith in directing the sheriff of Washoe county to make the service, under the belief that it was actually necessary in order to promote the ends of justice, and that the sheriff also acted in good faith, believing it to be his duty to obey such order and direction of the court; yet we are not authorized to go behind the statute and allow this charge upon any such ground.

The county of Humboldt had the right to anticipate, when the Rover case was transferred, that in the trial of the case the county of Washoe would not incur any expense not authorized by law, and it can not and ought not to be held liable for any such charge or expense.

3. Clerks' Fees. The charges of the clerk for issuing "time checks" or certificates to each juror should not have been allowed. The statute makes it the duty of the clerk "to keep an accurate account of the attendance of each juror during the term of the court, and at the close of the term to ascertain the amount due each juror for mileage and attendance, after deducting the amount received by him as fees in civil cases." (Stat. 1875, 138.)

The object of the legislature in requiring the clerk to keep such a record was to enable the county commissioners to ascertain the amount to be paid each juror "from the general fund of the county." A general certificate from the clerk, for which he would be entitled to charge one dollar, would be all that is necessary to accomplish that purpose.

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If any juror demanded a certificate of his time, attendance, and mileage, the clerk would, under the general fee bill, be authorized to charge him one dollar for the certificate; but he is not authorized to make any such charge against the county.

The clerk's charges for motions and orders entered and oaths administered are, in part, illegal.

The record shows "that the thirty motions and orders charged for by the clerk were actually made and entered in a memorandum book kept by the clerk in open court; but no more than eighteen of said numbers were ever actually entered in the regular court record;" that "the clerk actually administered forty-two oaths to the officers during the trial of the case, all of which appear upon his memorandum book kept in court, and only twenty-seven of which were ever formally entered in the regular court record."

We are of opinion that the records of the court are the best evidence to establish facts of this character.

The record is silent as to the character of the motions and orders entered in the memorandum book and not transcribed in the records of the court. They may or may not have been such motions and orders as would, if properly entered, have constituted legal charges.

There may be orders made by the judge during the progress of every trial that ought not to be entered in the record book. For instance, to cite extreme cases, the court might order a bystander to take off his hat or to be seated. He might order a witness to change his position, so that the court, jury or counsel could more distinctly hear his testimony. It would, however, be absurd to charge for such orders or to enter them in the record book. It is the duty of the clerk to keep a correct record of all the proceedings of the court legitimately pertaining to the trial of every case. It is the duty of the court to exercise a supervisory power over its own records and to see that the record book is not incumbered with improper or irrelevant matter.

The clerk is entitled to fifty cents for entering every motion, exception, rule, or order in the minutes of the court and is not entitled to any charge for the entry of such

Opinion of the Court—Hawley, J.

motions or orders in the memorandum book kept by the clerk for his own convenience.

If the clerk omitted to keep a correct record of all the proceedings of the trial he certainly ought not to complain of the court for refusing to allow him any compensation for the non-performance of his official duties.

4. Jurors' Fees. The objections of appellant to the charges for one day's attendance of all the jurors present on the first day of each of the trials of the Rover case are not well taken. The jurors were required to be present in court at that time and were each entitled to a fee for such attendance, whether then discharged or not.

For the reasons previously stated in allowing the sheriff's fees for summoning the jury, we are satisfied that the court did not err in allowing the amount claimed for mileage and per diem of jurors.

5. Reporters' Fees. The court did not err in excluding the question asked of the witness Soderberg by appellant's counsel. It being admitted that the court was authorized to appoint a short-hand reporter, and there being no statute regulating his charges, the only material question to be determined was whether or not the amount claimed was reasonable.

6. Surveyors' Fees. The certificate given by the counsel for the state justifies the action of the board of county commissioners and of the district court in allowing the bill presented by the surveyor.

In order to establish the guilt of Rover, the state was compelled to rely, to a great extent, upon circumstantial evidence. Much depended upon the truth or falsity of Rover's own statement, made before a justice of the peace on his preliminary examination, declaring his innocence and charging the crime for which he was indicted upon the principal witness for the state. To determine that question, as well as some others, it became important to ascertain the exact distances between certain specified points and the relative positions of certain fixed objects, and of given localities at and near the scene of the homicide. If the statement of Rover was true, a correct map of the premises would ma-

terially assist the defense in establishing his innocence. If his testimony was false a correct map would materially assist the prosecution in establishing his guilt. Any important fact which tends to establish either the guilt or innocence of a human being upon trial for his life should always be procured, if within the reach of the court, and presented to the jury, regardless of the question of expense to the county.

The circumstances which surrounded the Rover case establish beyond all controversy the truth of the certificate given by the attorneys for the state, that the survey and map were absolutely necessary for the proper presentation of the case to the jury.

7. Finally, it is contended by appellant's counsel that respondent cannot maintain this action because the claim it presented to the county commissioners of Humboldt county was not verified as required by the statute. (2 Comp. L. 3093, 3094.) This argument is not well founded. The claim in question is not governed by the provisions of the statute referred to, but is controlled by the provisions of the criminal practice act. When a criminal action is removed to another county for trial, the costs accruing upon such removal and trial shall be a charge against the county in which the cause of indictment occurred. (1 Comp. L. 2300.)

The next section provides for the auditing of such claims by the county to which such action was removed.

The various items of the claim presented to the county commissioners of Humboldt county, with the exception of the witness fees, which are regulated by sections 544 and 545 (1 Comp. L. 2169, 2170), had been properly audited by the commissioners of Washoe county in the manner required by the statute. (*Ex parte Taylor*, 4 Ind. 479.) It is, therefore, evident that it was not the intention of the legislature to have claims of this character classed with the unaudited claims and accounts which are presented to the county commissioners in the ordinary transactions of county business, and provided for by the act defining the duties of county commissioners. (2 Comp. L. 3093, 3094.)

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8. Modifications of Judgment. In accordance with the views expressed in this opinion, the following reductions must be made, viz.:

Attorney's fees.....	\$425 00	
Sheriff's fees—taking prisoner before court.....	\$ 7 50	
Sheriff's attendance on court ten night sessions.....	50 00	
Sheriff's mileage to Humboldt county for witnesses.....	69 40	
		126 90
Clerk's fees—time checks to jurors.....	\$49 00	
Clerk's fees—motions and orders.....	12 00	
Clerk's fees—oaths to officers.....	3 75	
		64 75
Total.....	\$616 65	

As we have no means of ascertaining the particular accounts disallowed by the district judge, and have, therefore, been compelled to notice all the accounts objected to by appellant, the reduction must be made from the amount claimed in the complaint.

The judgment of the district court is modified by reducing the amount to three thousand and twenty-eight dollars and forty cents, and as so modified the judgment is affirmed.

BEATTY, C. J., dissenting:

I concur in the views of the court upon most of the points discussed in the foregoing opinion, but in some particulars I feel obliged to dissent, and especially from the conclusion reached upon the seventh point. In my opinion it is a fatal objection to respondent's right to recover, that its claim, as presented to Humboldt county, was never verified as required by law. "No person shall sue a county in any case for any demand, unless he or she shall first present his or her claim or demand to the board of county commissioners and county auditor for allowance and approval," etc. (C. L., sec. 3092.)

Of course, to satisfy this provision of the statute, the claim must be presented in such form as will authorize the board to allow it in case it is found to be legal and just. If the commissioners have no authority to allow an unverified claim, and it is presented without being verified, this, it will be conceded, is no compliance with the law, and the

rejection of the claim under such circumstances will not entitle the holder to sue the county. It is not, and it cannot be, denied that all unaudited claims must be "sworn to," in order to give the board of commissioners and county auditor any authority to audit and allow them (C. L., secs. 2993, 3093, 3094); but it is held by the court that the claim against Humboldt county was not an unaudited claim, within the meaning of the statute. Upon this point I differ with the court. It is true that the aggregate of the sum claimed was made up of various other claims that had been audited and allowed by the commissioners of Washoe county, but it was, nevertheless, something new and logically distinct from those claims. It was a claim by a different party against a different party, and depending for its validity upon facts which the commissioners of Humboldt not only had the right to investigate, but which they were bound to investigate. The commissioners of Washoe audited the claims against that county, but they neither did nor could audit their own claim against Humboldt.

It is not denied—on the contrary, it is expressly conceded in the opinion of the court, that the audit in Washoe county was not binding upon Humboldt. It is there held that "appellant is not bound to pay every claim because it was presented to, examined, allowed, and paid by the respondent. It had the right to show, if it could, that the services charged for were never in fact rendered, or that the fees charged were unauthorized by the statute." Upon each of these grounds several considerable deductions are made from the amount of the judgment recovered in the district court. It appears to me that the decision upon this point is opposed to the conclusion that the claim against Humboldt county was ever audited in the sense of the statute—that is to say, examined and allowed by the commissioners and auditor. If the liability of Humboldt county depended upon the legality of the fees charged, and upon the fact that the services charged for had been actually rendered, it seems to follow necessarily that these were questions which the commissioners of Humboldt were bound to determine before they could allow the claim, and the examination of such

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questions—that is, of all questions of law and fact upon which the validity of a claim depends—is what is meant by the statute when it speaks of the auditing of claims.

The sections of the criminal practice act, referred to by the court, do not, in my opinion, control or affect the manner of presenting claims of one county against another. By the first (C. L. 2300) the county from which a criminal cause is transferred is made liable for the costs; and by the second (C. L. 2301) it is provided that the claim for costs shall be allowed in the first instance, and paid by the county in which the trial is had. From this it results merely that the county of Washoe had a valid claim against Humboldt county for the costs of the Rover trials; but I can see no reason why it was not bound to present its claim as other unaudited claims must be presented. Confessedly, it was not payable as a matter of course. There were questions both of law and fact to be decided before the commissioners of Humboldt could determine what, if anything, was due, and the examination and decision of such questions is what the statute means by the auditing of claims.

For these reasons, I think the plaintiff should have been nonsuited, and that the judgment should have been reversed. I differ with the court also in regard to the charge for summoning the panel of jurors. The evidence, in my opinion, not only fails to show that any extra jurors were required or summoned for the first trial of Rover, but the contrary is conclusively proven. Rover's case stood first on the calendar, and was followed by a number of other cases, particularly by the case of *The State v. La Point*. It seems that thirty-one jurors had been summoned for the term. The court ordered an additional venire for ten more jurors, and made it returnable on the day that Rover's case was set for trial. This is the sole reason why the county clerk (not the judge, who alone could know), chose to charge the cost of the venire to the Rover case. But, manifestly, this of itself is no reason at all. Nothing is more natural than that the panel of jurors should be directed to attend on the day when the first issue of fact on the calendar is set for trial—it is, I presume, the universal practice—but no

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one has ever supposed that it was therefore to be inferred that the cost of the venire was chargeable to that case. Still, it might be true, and if true it might be shown that an extra number of jurors was rendered necessary by the pendency of some particular case; but the burden of proving the fact would lie upon whoever asserted it. Here there is no proof that any extra jurors were required for the Rover case, but, on the contrary, it was proved and admitted that forty jurors were in attendance on the day it was set for trial; that of these only twenty were sworn on *voir dire* in order to obtain the trial jury; that the whole forty were kept for the trial of other cases, and that additional venires for a large number of jurors were issued specially for the La Point case. This shows that not only the panel of forty, but other additional jurors were required by Washoe county for its own purposes, and that the pendency of the Rover case put it to no expense on that account.

As to the second trial, the case is not so clear; but here again the opinion of the county clerk is all that the plaintiff could offer in support of its claim.

Upon another point, also, I dissent from the views of the court. The expenses of witnesses who attend upon a criminal trial from without the county must be allowed by the court, and the allowance must be evidenced by an order entered upon the minutes of the court. (C. L. 2169, 2170.) Upon the trial of this case, orders of the judge made out of court were admitted against defendant's objection to prove such allowances. I think the evidence was incompetent, and that it was error to admit it. The material question was not whether the witnesses had been paid by the treasurer of Washoe, but whether the allowances had been made. No one will pretend that any sum the treasurer chose to pay to the witnesses was recoverable from Humboldt county merely because he had paid it and the amount was not unreasonable. There must also have been an allowance by the proper authority, and if the statute requires, as it plainly does, that the allowance when made shall be evidenced by an order spread upon the minutes of the court, that evidence, and that alone, was admissible to prove the fact.

Argument for Relator.

For these reasons, I think that if the respondent could recover anything, the amount of the judgment should be still further reduced than it has been by the order of the court.

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14 238

[No. 953.]

THE STATE OF NEVADA *EX REL.* M. C. LAKE, RE-
LATOR, *v.* THE COUNTY COMMISSIONERS OF
WASHOE COUNTY, RESPONDENT.

JURISDICTION OF BOARD OF EQUALIZATION TO RAISE ASSESSMENT — CERTIORARI.—If the board of equalization acts without jurisdiction in raising an assessment, that is a good defense *pro tanto* in any suit for the tax, and in such a case the writ of certiorari ought not to be issued to review the action of the board.

IDEM—WRITTEN COMPLAINT NOT NECESSARY.—The law does not require that a written complaint shall be filed in order to authorize the board of equalization to raise an assessment.

IDEM—PUBLICATION OF NAMES MERELY DIRECTORY.—The law requiring a list of persons, the valuation of whose property has been raised by the board of equalization, is merely directory. It is not a defense in a tax suit unless it has actually injured the defendant.

PETITION for writ of certiorari.

The facts are sufficiently stated in the opinion.

Boardman & Varian, for Relator.

I. The petition shows upon its face that Lake is the party beneficially interested. The action, though in the name of the state, is substantially brought for Lake's benefit.

II. The affidavit of Hymer can not be considered. The statute does not provide for the preservation of testimony in these cases. (*C. P. R. R. Co. v. Placer Co.*, 34 Cal. 352.)

III. No record facts to show that any complaint, oral or written, was presented. The commissioners had no jurisdiction. (*Swift v. Ormsby Co.*, 6 Nev. 97.)

IV. The law gave Lake the right, after publication, to have a hearing. There was no publication as required by law. (2 Comp. L. 3139.)

Opinion of the Court—Beatty, C. J.

John Bowman, District Attorney of Washoe County, and Wm. Cain, for Respondent.

I. The writ of certiorari ought to be dismissed, because the state of Nevada is not the party beneficially interested. (*Board of Co. Com. Washoe Co. v. Hatch*, 9 Nev. 357; Vol. 1 Comp. Laws, sec. 1498; *Tyler v. Houghton*, 25 Cal. 26; *People v. Pacheco*, 29 Id. 210; *People v. County Judge*, 40 Id. 479; *Parson v. Holt*, Id. 466; *Maxwell v. Rives*, 11 Nev. 214.)

II. The action of the board was entirely legal. They had jurisdiction over the subject-matter, generally, and an oral complaint was sufficient to give them jurisdiction in this case. It is not claimed by relator that an injustice has been done in raising the taxes on his land. (*State v. N. Belle*, 12 Nev. 91.)

By the Court, BEATTY, C. J.:

The respondents, sitting as a board of equalization, made an order adding to the assessed value of petitioner's property. He seeks by certiorari to have that order set aside and declared void upon the ground that the board had no jurisdiction to act. It is alleged that the order was made without any complaint of undervaluation, either oral or written, having been laid before the board. Upon presentation of the petition we ordered the writ to issue, and the respondents have made their return thereto, which shows that no written complaint was filed, and that there is nothing in the minutes of the board to show that even an oral complaint was made. The return is, however, accompanied by an affidavit of the chairman of the board to the effect that such a complaint was made, but that a recital of the fact was inadvertently left out of the minutes of their proceedings.

The petitioner objects to the consideration of this affidavit on the ground that it is not a part of the record. The objection is probably well founded as the case stands; but we think very respectable authority might be found for ordering the board to amend its record so as to conform to the facts, and to make a return of its record as amended.

Opinion of the Court—Beatty, C. J.

This, however, is a question of some nicety; and, as the case may be disposed of upon other grounds, we abstain from deciding or discussing it. Assuming for the present that we cannot, in this proceeding, look beyond the minutes and files of the board, we are all the more convinced that we ought not to have issued the writ. It should have been denied upon the ground that the petitioner had another plain, speedy, and adequate remedy. If the board acted without jurisdiction in raising his assessment, that is a good defense *pro tanto* in any suit for the tax; and since, as we assume, we cannot in this form of action make a full inquiry into the facts upon which their jurisdiction depended, it is all the more necessary that the petitioner should be remitted to that mode of redress in which the facts may be more fully shown. Another weighty consideration impelling us to the same conclusion is the fact that the State, although not a party to this proceeding, would be bound by any order we might make annulling the action of the board, and would be precluded from proving, in its suit for the tax, that a sufficient complaint was made to authorize the action of the board. (*State v. C. P. R. R.*, 10 Nev. 79, 80.)

It was claimed by petitioner, at the time of presenting his petition, that section 32 of the revenue law (C. L. 3156), which excludes all except certain enumerated defenses in tax suits, would prevent him from relying upon the want of jurisdiction in the board to raise his assessment. But this is a mistake. The concluding sentence of that section, "and no other answer shall be permitted," must be understood with this qualification, that it does not exclude the direct denial of any allegation of the complaint necessary to be proved in order to entitle the state to recover. The assessment is one of the facts which the state is bound to prove, and if the commissioners had no jurisdiction to raise petitioner's assessment, their act was void, and can be collaterally attacked. (*People v. Reynolds*, 28 Cal. 108; *People v. Flint*, 39 Id. 670; *People v. Goldtree*, 44 Id. 323; *Beck v. Commissioners of Washoe*, recently decided in this court.)

Points decided.

We intimated in the case of *The State v. Northern Belle Company* (12 Nev. 92, 93), that an oral complaint was sufficient to authorize action by the board of equalization. We know of no decision to the contrary, unless it can be said that it was so held in *People v. Goldtree*, *supra*. But the point was not really involved in that case, as it was decided upon the ground that there was no complaint of any sort made to the board. All that was said, moreover, was that it had been held in *People v. Reynolds*, and affirmed in *People v. Flint*, "that the filing of a complaint was necessary." By reference to those cases, however, it will be seen that the point was not decided in either of them. In the first there was no sort of complaint made, and all that was decided or intimated was that some sort of complaint was necessary. In the second case a written complaint had been filed, but it was held to be defective in substance. The truth is, the point has never been directly passed upon in California, and we find nothing in either the letter or spirit of the statute requiring a written complaint.

We have not noticed the other point relied upon by the petitioner, that is, that the clerk failed to publish a list of the persons the valuation of whose property had been raised by the board, for the reason that in our opinion it does not affect the question of jurisdiction. The publication of such notice is one of those acts "between the assessment and commencement of suit" which are expressly declared to be "directory merely," and a non-performance of which is not ground of defense in a tax suit unless it has actually injured the defendant. (C. L. 3156; *State v. C. P. R. R.*, 10 Nev. 61.)

The writ having been improvidently issued is hereby set aside and the proceeding dismissed.

[No. 943.]

J. T. JEFFREE, ADMINISTRATOR, APPELLANT, v. JAMES WALSH ET AL., RESPONDENTS.

SURETIES—OFFICIAL BOND—PLEADING.—In an action brought against the sureties on the official bond of the public administrator, the complaint

Argument for Appellant.

will be defective if there is no allegation that the defendants executed the bond.

NEW TRIAL, WHEN COURT CHANGES ITS RULING—If the court makes a ruling during the progress of the trial, the party in whose favor the ruling is made, is entitled to have the case decided according to the ruling in all cases where, if the ruling had been against him, he might have been able to remove the objections made by the other party.

AMENDMENT TO PLEADINGS—If evidence is objected to because the pleadings are defective, the court should allow the pleadings to be amended.

TESTIMONY IMPROPERLY ADMITTED—Where testimony has been improperly admitted, under the pleadings it ought not to be considered for any purpose.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts sufficiently appear in the opinion.

Branson & Tilden, for Appellant.

I. The complaint was sufficient. (*Gutridge v. Vanatta*, 27 Ohio St. 366; 1 Comp. Laws, 1116; *Union Bank v. Bell*, 14 Ohio St. 208; *Trustees v. Odlin*, 8 Id. 293; *Lewis v. Coulter*, 10 Id. 451; *Slaterly v. Hall*, 43 Cal. 191; *Hiemmelman v. Spanigal*, 39 Id. 401; *Reynolds v. Hosmer*, 45 Id. 616; *Treadway v. Wilder*, 8 Nev. 91.)

II. Appellant was led astray by the ruling of the district court, on the general demurrer. He had a right to rely on the sufficiency of his complaint. The findings of the court is a reversal of the court's former decision. The court had the power and should have allowed an amendment of the complaint in this respect, so as to conform to the proof made; and his refusal to do so was an abuse of discretion. (Practice Act, sec. 68, 70, 71; *McMannus v. The Ophir Silver Mining Company*, 4 Nev. 15; 1 Van Sanford's Pleadings, 834; *Treadway v. Wilder*, 8 Nev. 91; *Smith v. Yreka Water Company*, 14 Cal. 201; *Connolly v. Peck*, 3d Id. 75; *Barth v. Walther*, 4 Duer, 228; *Sherman v. Fream*, 8 Abbott, 33; *Pollock v. Hunt*, 2 Cal. 193; *Cooke v. Spears*, Id. 409; *Stearns v. Martin*, 4 Id. 227; *Clark v. Phoenix Ins. Co.*, 36 Id. 168; *Stringer v. Davis*, 30 Id. 318; *Kirstein v. Madden*, 38 Id. 158.)

Seely & Woodburn, for Respondents.

Opinion of the Court—Hawley, J.

By the Court, HAWLEY, J.:

It is claimed by appellant that the defendants were sureties upon the official bond of S. Symons, as public administrator of Storey County; that as such sureties they became, and are, liable to the estate of William L. Williams, deceased, for a certain amount of money alleged to have been embezzled from said estate by said public administrator.

The only allegation in plaintiff's complaint tending to connect the defendants, or either of them, with the subject matter in controversy, is as follows:

"That at the general election held in the State of Nevada on the third day of November, 1868, Samuel Symons * * * was duly elected to the office of public administrator in and for the county of Storey * * * and on the nineteenth day of December, A. D. 1868, the said Samuel Symons made and executed his official bond, a copy of which, with the indorsements thereon, is hereunto annexed, marked 'Exhibit A,' and made a part of this complaint; that on the twenty-second day of December, A. D. 1868, the said Samuel Symons did qualify as such public administrator, and on the date last aforesaid the said official bond was duly approved by the board of county commissioners, in and for the said county of Storey, and the same was * * * filed for record in the office of the county clerk * * * and was * * * duly recorded in the said office, according to law."

Exhibit "A" contains the names of the defendants as sureties.

The defendants when served with process appeared separately and demurred to said complaint upon the ground, among others, that: "The complaint does not state facts sufficient to constitute a cause of action either in favor of said plaintiff against all or any of the defendants, or against all or any of the defendants in favor of any one."

The demurrers were overruled by the court, and, after issue joined, the case was tried before the court without a jury.

All the evidence offered by the plaintiff was admitted

Opinion of the Court—Hawley, J.

subject to the defendants' objection, that the same was irrelevant to any issue raised by the pleadings.

No evidence was offered by the defendants.

The court rendered a judgment in favor of defendants for their costs.

The statement on motion for a new trial shows that the court rendered this judgment upon the ground: "That the plaintiffs complaint nowhere stated or alleged that defendants had ever executed the official bond of Samuel Symons as public administrator, and that otherwise the court found a good cause of action on the merits."

After the court had rendered its decision plaintiff's counsel "asked leave to so amend his complaint as to allege, in terms, that defendants had executed the said bond in accordance with the proofs in the case. The court declined to allow plaintiff to so amend his said complaint for the reason that it was too late, because the case had been submitted and decided."

Upon this statement of facts it is evident: First, that the court erred in not sustaining the demurrers interposed by the defendants; second, that upon the trial, or at least before rendering its decision, the court became convinced of its error, for it rendered a judgment in favor of the defendants on the very ground upon which it ought to have sustained the demurrers in the first instance. The plaintiff was misled by this action of the court.

If the demurrers had been sustained, the plaintiff would then have had an opportunity to amend his complaint so as to state a cause of action against the defendants; but having overruled the demurrers, the plaintiff had the right to anticipate that the court would adhere to its ruling, and he ought not to be compelled to incur the additional expense of another action.

We are of opinion that the court erred in refusing to grant a new trial for the purpose of allowing plaintiff to amend his complaint.

This conclusion is fully sustained by the decision of the supreme court of California in *Carpentier v. Small*. The action was ejectment to recover certain lands. The de-

defendants undertook, in their answers, to set up a claim—to have the value of certain improvements set off against the damages. On the trial they offered evidence in support of this branch of their answers, to which the plaintiffs objected on the ground of “incompetency and immateriality, because no sufficient foundation for such evidence was laid in the pleadings.”

This objection was overruled and the evidence admitted.

In the findings of the court the conclusion of law upon this point was: “That under the pleadings none of the defendants are entitled to have the value of these improvements allowed as a set-off against the damages for withholding the property.”

Upon this state of facts the court said: “After the testimony was admitted, then, the court, when the findings came to be drawn, and after further reflection, must have come to a different conclusion from that entertained when the evidence was admitted. This change of opinion may have worked great injustice to the defendants. They made an attempt to set up a valid claim for improvements in their answers. The plaintiff did not demur for insufficiency, but did raise the question on that ground by objection to the introduction of evidence under it. The court then deemed the answer sufficient and admitted evidence. The ruling was with the defendants on that point. There was, therefore, in view of the ruling of the court, no occasion to amend, and no leave to amend was asked. Had the ruling been the other way the defendants might have obviated the objection by amendment. But, relying on the ruling, the subsequent change in the view of the court has deprived them of an opportunity to correct the defect in their pleadings, and they may lose the value of their improvements in consequence of the action of the court, when it was too late to remedy it. We think the defendants were entitled to rely upon the ruling, and since a different view finally prevailed, that they should have an opportunity to obviate the defect in the pleadings, otherwise great injustice may result.” (35 Cal. 362.)

We are asked by appellant to examine the testimony and

Argument for Appellants.

decide this case upon its merits. For obvious reasons this would be improper.

The defendants, relying upon their demurrers and objections to the testimony offered by plaintiff, made no defense upon the trial. They are entitled to their day in court for the purpose of making a defense upon the merits. It would be as great an act of injustice to deprive them of the opportunity to be heard as it would be to deprive plaintiff of the opportunity of correcting his pleading.

The testimony having been improperly admitted, under the pleadings, will not be considered for any purpose whatever. The judgment of the district court and its order refusing a new trial are reversed, and the cause remanded for a new trial, with leave to plaintiff to amend his complaint.

[No. 884.]

E. D. BARKER, SUBSTITUTED IN THE PLACE OF JOHN B. HELM, RESPONDENT, v. ANGUS McLEOD ET AL., APPELLANTS.

SHERIFFS' FEES—CONTRACT.—If a sheriff, for the sake of obtaining employment, agrees in advance to render official services for a party to a suit, and to receive nothing unless such party recovers in the action, he will be bound by his agreement and cannot recover his fees without showing that such party did recover in the suit.

IDEM—DISSOLUTION OF ATTACHMENT—PROCEEDINGS IN BANKRUPTCY.—The adjudication of bankruptcy dissolves an attachment and vests the title to the property in the assignee. The sheriff is not thereafter entitled to recover any costs for keeping the property.

APPEAL from the District Court of the Eighth Judicial District, Esmeralda county.

The facts are stated in the opinion.

A. W. Crocker and Wells & Stewart, for Appellants.

I. The court erred in charging the jury that the sheriff could recover if he received nothing on his contract.

II. The courts of bankruptcy are not dependent to any extent upon the state courts. Their orders are effective *per*

se, so that when property of a bankrupt is assigned in bankruptcy, if under attachment not four months old, the attachment is at once dissolved, and this dissolution relates back to the time of the filing the petition in bankruptcy. (9th ed. Bump's Bankruptcy, p. 480, sec. 5044; same, p. 501; title, dissolution of attachments.)

D. J. Lewis and T. W. W. Davies, for Respondent.

I. If the contract which the defendants in their answer have attempted to set up as matter of abatement ever was made, supported by a good and sufficient consideration, and was in all respects lawful, the defendants, as to their part of the contract, have failed to show any exercise of due diligence in complying with its terms and requirements. The special contract attempted to be pleaded in abatement by the defendants is not a lawful contract.

II. There is no proof that Helm had actual knowledge of the bankruptcy of the Columbus M. and M. Co. until he was advised thereof by the order of the district court of the eighth judicial district, in and for Esmeralda county, Nevada, served upon him June 14, 1875. (Bump's Bankruptcy, 502; citing 8 B. R. 533; S. C. 1 Wool, 324; 11 B. R. 317.)

The sheriff must look to the party that employed him for his fees; he has no claim against the opposite party. (*Zeiber v. Hill*, 8 B. R. 239; 1 Sawyer, S. C. R. 268.)

The officer cannot look to the assignee of the bankrupt. (Bump's Bank, 496, 497, cites 39 Ga. 29; 2 B. R. 662; S. C. Lowell, 306; 7 B. R. 346; 6 B. R. 545; and see Crocker on Sheriffs, sec. 471.)

By the Court, BEATTY, C. J.:

This is an action by a former sheriff of Esmeralda county to recover his fees and keeper's charges for attaching and keeping the property of the Columbus Mill and Mining Company in a suit brought by these defendants. The plaintiff had judgment in the district court and the defendants have appealed from the judgment and the order of the court overruling their motion for a new trial.

Opinion of the Court—Beatty, C. J.

It will not be necessary to notice more than two of the points made in support of the appeal.

I. The defendants allege in their answer that plaintiff's services in the attachment case were rendered in pursuance of an express agreement that he was to receive nothing therefor except in case, and to the extent, that there should be a recovery in the action; and they allege that nothing was recovered by reason of the fact that the Columbus Mill and Mining Company was adjudicated bankrupt within less than four months after the issuance of the attachment.

On the trial it was admitted that the attachment in question was issued May 12, 1874, and levied May 14th; that on July 16th following, the Columbus Mill and Mining Company was adjudicated bankrupt; that a receiver was appointed and qualified, and that due notice of the proceedings in bankruptcy was filed in the court where the attachment was pending on July 21st. It was also shown by uncontradicted testimony that the property attached was finally turned over to the receiver in bankruptcy. As to whether the sheriff made the alleged agreement for a contingent compensation the evidence was conflicting.

No question was made in the district court as to the validity of such a contract, but the case was tried and the issue submitted to the jury upon the theory that the alleged agreement, if proved, was binding on the plaintiff. In this court counsel for respondent have suggested in argument that an agreement by a sheriff, that the payment of his fees for serving process should be contingent upon the success of the plaintiff, would be contrary to good morals and public policy, and therefore void. The point, however, has not been presented or argued in a manner to justify us in deciding it at this time. It is sufficient for the present purpose to say that, admitting the correctness of respondent's proposition, it would not affect our conclusion, that the judgment of the district court must be reversed. For under the instruction to the jury, which we are about to notice, their verdict must have been in favor of the plaintiff, notwithstanding they were satisfied his services were rendered

in pursuance of this supposed illegal and fraudulent contract; whereas the law is settled, so far as this court is concerned, that such a contract can never be enforced. (*McCausland v. Ralston*, 12 Nev. 195.)

We propose, however, to examine the rulings of the district judge in the light of the theory upon which the case was tried, and, assuming that the alleged agreement, if made, was not illegal, to determine whether the following instruction was erroneous: "If you believe that the plaintiff agreed to receive his pay for services rendered only in the event that defendants (plaintiffs in the action, *McLeod et al. v. Columbus M. and M. Co.*) recovered from defendant in said action, and plaintiffs gave him nothing, nor promised him nothing for so agreeing, then you will find for the plaintiff."

This instruction, to the giving of which the defendants excepted, is awkwardly expressed, but its meaning is apparent except as to the words "services rendered," which, in the light of the testimony, must have been understood in the sense of services to be rendered. So construed, the instruction was erroneous. The right of a sheriff to be paid for his services is of no higher or more sacred character than that of a private person. If either is unconditionally requested to perform a service for another, the law implies a promise to pay, in one case the reasonable value, in the other the legally ascertained value, of the service. If the service is performed, the employer is bound to pay because, and only because, he has promised to pay. But if, for the sake of obtaining an employment, a private person expressly stipulates for a contingent reward, it can not be doubted that he is bound by his agreement; the obtaining of the employment is all the consideration necessary to support it, and there is no reason (aside from the question of morality above alluded to) why a sheriff may not bind himself by a similar stipulation. In such case, when he comes to demand payment, the question will be, not whether he was paid or promised anything for agreeing to serve for a contingent reward, but whether the condition upon which the employer agreed to be bound, has been fulfilled; if it has

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not, no payment is due. The position of a sheriff under such contract may be worse, but can not be better than that of a private person. He must recover, if at all, under the contract; if the contract is in violation of his official duty, it is void.

II. Nearly one thousand dollars of the amount recovered by the plaintiff in the district court was on account of keeper's charges for keeping the property attached after the Columbus Milling and Mining Company had been adjudicated bankrupt. Appellants contend that the receiver of the estate was alone liable for those charges.

The facts in relation to this branch of the case are that the receiver, immediately upon his appointment, notified the keeper of the property and requested him to keep it for him. The keeper made no response to this proposition, and, it seems, failed to inform the sheriff. The result was that the property remained in his charge for nearly a year after the attachment had been dissolved before there was any order of court to turn it over to the receiver. Upon this state of the case the district judge instructed the jury in effect that the sheriff, being compelled to hold the property in obedience to the writ of attachment until relieved by order of that court, was entitled to recover his charges from the attaching creditors.

This was error. The adjudication of bankruptcy dissolved the attachment and vested the title to the property in the assignee. (R. S. sec. 5044). It may have been the duty of the sheriff to hold the property till ordered by the court to turn it over (*Johnson v. Bishop*, 8 N. B. R. 533), but from the date of the dissolution of the attachment he, or his keeper, became divested of all official relation thereto and became a simple bailee thereof to the use of the assignee, who thereupon became liable for the cost of preserving it. (*In re Preston*, 6 N. B. R. 545; *Gardner v. Cook*, 7 Id. 346; *Zeiber v. Hill*, 8 Id. 239; *In re Fortune*, 2 Id. 662). The attaching creditors, if liable at all under their contract with the sheriff, were liable only for the costs accruing before the dissolution of the attachment. If this rule ever works a hardship upon the officer who has levied an attachment,

Points decided.

such cases must be of very infrequent occurrence, for ordinarily he is fully protected by the liability of the assignee; and any other rule would almost invariably be productive of much greater hardship to the attaching creditor. But whatever may be the operation of the rule in general, in this case it is vindicated by the result. If the sheriff did not have actual knowledge of the bankruptcy of the Columbus Milling and Mining Company he is at least chargeable with the actual knowledge of the keeper, who was his chosen agent, and if he was going to hold the attaching creditors for the costs of keeping the property, on the plea that he was bound to keep it until relieved by an order of court, then it was his duty to inform them of the demand of the receiver so that they might save themselves further useless expense by releasing the attachment. He excuses himself for not informing them upon the ground that the keeper did not inform him; but, as above stated, the fault of his chosen agent is imputable to him, and besides it does not appear that he has ever paid the keeper. In every view the merits of the case, so far as this point is concerned, appear to be on the side of the appellants.

The judgment and order appealed from are reversed and the cause remanded for a new trial.

[No. 855.]

JOSEPH B. GOSSAGE ET AL., APPELLANTS, v. CROWN
POINT GOLD AND SILVER MINING COMPANY,
RESPONDENT.

HEIRS—RIGHT TO MAINTAIN EJECTMENT—ESTATES OF DECEASED PERSONS—STATUTES CONSTRUED.—In construing section 116 of the act to regulate the settlement of the estates of deceased persons (1 Comp. L. 596): *Held*, where there are no creditors to be affected, no debts outstanding against the estate, no equity in favor of the administrator, that the heirs of the estate have the right of possession, and may bring an action of ejectment in their own name to recover any property belonging to the estate.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts appear in the opinion.

Opinion of the Court—Hawley, J.

John A. McQuaid, H. O. Beatty, and T. W. Healy, for Appellants.

The heir can bring suit in ejectment before distribution of estate. (Comp. L. Mich., vol. 2, 882; Comp. L., sec. 2904, ed. 1857; *Updegraff v. Trask*, 18 Cal. 458; *Beckett v. Selover*, 7 Id. 215, 229; *Streeter v. Paton*, 7 Mich. 341; *Marvin v. Schilling*, 12 Id. 356; *Campau v. Campau*, 19 Id. 116; *Masterson v. Girard's Heirs*, 10 Ala. (N. S.) 61; *Carruthers v. Bailey*, 3 Kelly (Ga. Sup. Ct.) 105; *Hubbard v. Ricart*, 3 Vt. 207; *Maltonner v. Dimmick*, 4 Barb. 566; *Austin v. Bailey*, 37 Vt. 222; *Gibson v. Farley*, 16 Mass. 280; *Lynch et al. v. Baxter*, 4 Tex. 431; *Easterling v. Blythe*, 7 Id. 210; *Lacey v. Williams*, 8 Id. 182; *Blair v. Cisneros*, 10 Id. 34; *Homulle v. Zapp*, 20 Id. 807; *Patton v. Gregory*, 21 Id. 513; *Thomas v. Greer*, 6 Id. 372; *Bufford v. Holliman*, 10 Id. 560; *McIntyre v. Chappell*, 4 Id. 187.)

At common law, the land or real estate held in fee by an intestate descended immediately to the heir at law; the administrator had nothing to do with it. (Hill. on Real Property, vol. 2, 189.) For this doctrine generally, see 4 Bac. Abr., Tit. "Heir and Ancestor," Letter "F," p. 616 *et seq.*; 7 Cal. 229, 238-9; 39 Id. 188; Bac. Abr., vol. 9, p. 648.

Seely & Woodburn, for Respondent.

I. Under the statute of this State, the right to the possession of real property of an estate remains exclusively with the administrator until the estate is settled or distribution is directed by order of the district court; and until then, neither the heirs nor their grantees can maintain ejectment for any portion of such property. (C. L., sec. 116; *Meeks v. Hahn*, 20 Cal. 620; *Meeks v. Kirby*, 47 Id. 168; *Chapman v. Hollister*, 42 Id. 463.)

II. The administrator is a necessary party to all suits affecting the estate of a deceased person. (*Harwood v. Marye*, 8 Cal. 580.)

By the Court, HAWLEY, J.:

The plaintiffs in this action are heirs of the estate of

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John Gossage, deceased, and brought this suit to recover fifteen feet, undivided, in the Crown Point mine.

The allegations of the complaint, in so far as they relate to the questions raised by the demurrer, are substantially as follows:

That John Gossage died intestate in Storey county, Nevada, on the eighth day of February, 1862; that on the sixteenth of November, 1864, Cornelius Reiffer, the first administrator of the estate, rendered his final account; that at that time all the debts of said estate had been paid; that there has never been any indebtedness or claim of any kind against said estate since that time; that at that time N. W. Winton was appointed administrator of said estate, and immediately after his qualification as such administrator he left the state and has never since returned, and has never at any time exercised any of the functions or performed any of the duties of administrator of said estate; that on the fifteenth of May, 1875, S. H. Robinson was duly appointed administrator of said estate in place of said Winton, and is now the administrator thereof; that said Robinson did at the time of the commencement of this suit decline to commence the same as administrator of said estate, or any suit whatever, to protect the rights of plaintiffs, and did waive, and has ever since, and still does waive, all rights which he might have as such administrator to bring or maintain this suit in favor of these plaintiffs. This complaint is verified by the administrator, S. H. Robinson.

A demurrer was interposed to the complaint upon the grounds "that plaintiffs have not the legal capacity to sue, for that it appears upon the face of their complaint that there was at the date thereof an administrator of the estate of John Gossage, deceased, who is lawfully entitled to the possession of the mining ground sought to be recovered.

"Second—That there is a defect of parties plaintiff herein for that S. H. Robinson, administrator of the estate of John Gossage, deceased, should have been made plaintiff."

The court sustained the demurrer and rendered judgment in favor of the defendant for its costs.

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This appeal calls for a construction of section 116 of the act to regulate the settlement of the estates of deceased persons, which reads as follows: "The executor or administrator shall have a right to the possession of all the real, as well as personal, estate of the deceased, and may receive the rents and profits of the real estate until the estate shall be settled, or until delivered over by order of the probate court to the heirs or devisees." (1 Comp. Laws, 596.)

It is claimed by the respondent that under the provisions of this section the right to the possession of real property remains exclusively with the administrator until the estate shall be settled or until delivered over as in said section provided. This view of the case is fully sustained by the decisions of the supreme court of California. (*Meeks v. Hahn*, 20 Cal. 620; *Chapman v. Hollister*, 42 Id. 463; *Meeks v. Kirby*, 47 Id. 168.)

The statute of California is identical with the statute of this state, and for that reason it is argued that the decisions of that state should be followed. It so happens, however, that California is not the only state where the statute is the same.

The statute of Michigan reads "rents, issues, and profits" instead of "rents and profits," and "shall have been settled" instead of "shall be settled." In all other respects the language is identical with the statute of this state. The words changed do not affect the interpretation as to the right of the heirs to the possession of the property.

The supreme court of Michigan, in construing this section of the statute, have decided that the right of the possession is in the heir until the executor or administrator takes possession, or otherwise claims his rights under the statute. (*Streeter v. Paton*, 7 Mich. 341; *Marvin v. Schilling*, 12 Id. 356; *Champan v. Champan*, 19 Id. 116.)

All the decisions in the respective states, where the question is alluded to, concede the proposition that in construing this section of the statute, the entire probate system relative to the settlement of the estates of deceased persons, as well as the statute concerning descents and distribution, must be considered. There can not be any controversy as

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to the correctness of this general rule. The rights of the relative parties ought always to be considered, and such an interpretation given as would afford the protection intended to be reached by the legislature.

In *Meeks v. Hahn*, the supreme court of California refer to the various sections of the probate act, and of descents, and distribution, and from the language of the entire acts come to the conclusion heretofore announced.

In *Chapman v. Hollister*, the court add as a reason for following the decision in *Meeks v. Hahn*, that if the heir or devisee should be held entitled to the possession, it would lead to great perplexity in the settlement of estates, would tend to promote litigation, and embarrass the administration of estates, without increasing the security of creditors and heirs.

In *Streeter v. Paton*, the various sections of the statute of Michigan were considered and elaborately reviewed. It was there held that the object of this particular section of the statute was to prevent injustice to creditors, and to have the rents as well as the proceeds of the sale of the real estate applied to the payment of debts; that the language of the section is not imperative, but gives a right which the administrator or executor may or may not exercise; that it is the duty of the personal representative to take possession of the real estate, when it, or the rents and profits, may be needed in the settlement of the estate; but when this is not the case, although he may do so under the statute, it is not imperative on him; that there is no valid reason why it should be imperative; that the personal estate may be more than ample for all the purposes of administration, and years may be required in settling the estate; that it would be a harsh construction of the statute that would deprive the heir of his inheritance in the mean time. This decision was rendered prior to the adoption of our statute, the California decisions being subsequent, hence the presumption of law is in favor of the construction given by the supreme court of Michigan. (*Williams v. Glasgow*, 1 Nev. 533; *McLane v. Abrams*, 2 Id. 199; *Ash v. Parkinson*, 5 Id. 15; *Hess v. Pegg*, 7 Id. 23; *State v. Robey*, 8 Id. 312.)

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But in deciding the question involved in this case, we propose to give to the decisions of California equal weight and equal consideration, and determine for ourselves which view of the case is best sustained upon reason or sanctioned by the authority of analogous cases.

It is acknowledged by all the authorities, that under the provisions of the statute, the real estate of an intestate vests in the heirs, subject only to the lien of the administrator for the payment of debts and the expenses of the administration. (*Beckett v. Selover*, 7 Cal. 238; *Chapman v. Hollister*, 42 Id. 463.)

If there is no administration upon the estate, the heirs may maintain ejectment for the real estate of the intestate. (*Updegraff v. Trask*, 18 Cal. 458; *Lacy v. Williams*, 8 Tex. 187.)

If there is an administrator, it is his duty to take charge of the estate for the purpose of paying the debts, and when the claims against the estate have all been satisfied it is his duty to pass it over to the heir whose absolute property it then becomes. (*Brenham v. Storey*, 39 Cal. 186.)

The possession of the property given by the statute to the administrator is for the benefit of the creditors and the heirs. It is given for the purposes of the administration, and ought only to be exercised as the exigencies of the case may require. (*Easterling v. Blythe*, 7 Tex. 213; *King v. Boyd*, 4 Or. 326; *Humphreys v. T aylor*, 5 Id. 260.)

The supreme court of Texas, in *Patten v. Gregory*, following their previous decisions in *McIntyre v. Chappell*, 4 Tex. 192; *Blair v. Cisneros*, 10 Id. 55; and *Bufford v. Holliman*, Id. 575, say: "By law the whole of an estate vests in the heirs testate, or *ab intestato*, at the death of a person deceased. It passes from them *sub modo* for the purposes of administration, and the administration is required to be speedy, so that the remainder, if any, may be returned to its real owners, the heirs. The neglect of an administrator for six years would, perhaps, of itself, be sufficient ground for the heirs to sue, and this, in connection with the positive refusal of the administrator to bring the action, we believe to be good ground for an exception to the general rule, and

that the demurrer, for the want of parties, was properly overruled." (21 Tex. 518.)

In Alabama, it has been decided that the heir "is invested with the title, and may exert it with all its incidents until the administrator, by notice to the tenant, or by actual suit, indicates his intention to assert the power reposed in him by the statute;" that "the title and right of the heir is subject to the exercise of the statute power, but where the power is not asserted or exercised by the administrator * * * the heir is entitled to the estate and its incidents, as at common law." (*Masterson v. Girard's Heirs*, 10 Ala. 62.)

In Georgia it has been decided "that on the death of the ancestor intestate, the title to his land is cast upon his heirs-at-law, subject to the payment of the debts of the intestate;" that "the heirs have such a title as will enable them to maintain ejectment to recover the possession of the land against a mere wrong-doer;" that "the administrator can maintain the action of ejectment also, to recover the possession of the land, so as to enable him, as the agent of the law, to perform the duties enjoined upon him by the law, and for that purpose only." (*Carruthers v. Bailey*, 3 Kelly, 111.)

In Wisconsin, where the section of the statute is substantially the same as the statute of this state, of California, and of Michigan, the supreme court, in considering the question as to the construction that ought to be given to the statute, although the question was not directly at issue, say: "The intent doubtless is to place the whole estate, real and personal, in the possession and under the control of the executor or administrator in proper cases to enable him to pay debts against the estate and legacies. Where there are no such debts or legacies to be paid, there is no valid reason why the executor or administrator should have possession of the real estate. Hence the provision that if the estate is settled, that is, if there are no claims against it, none in its favor, no personal property belonging to it, and the real property which once constituted a portion of it has passed into the

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possession of the devisees thereof and those claiming under them, the executor or administrator has no longer any right to the possession of the real estate. To hold that the statute is not applicable to this case because those results were not worked out through the slow and expensive processes of administration, and probate orders and decrees, would be to sacrifice substance to mere form, and to disregard entirely the plain and obvious intention of the statute." (*Flood v. Pilgrim*, 32 Wis. 379.)

Taking into consideration the peculiar facts of this case, it is apparent that no rights of the administrator, or of any creditor, would in any manner be embarrassed by allowing the heirs to maintain this action in their own name. They are the real parties in interest. They alone will be benefited or injured, as the case may be, by the result of the suit. There are no creditors to be affected. No costs or debts of any kind outstanding against the estate. Neither is there any existing equity of any character in favor of the administrator. Moreover, if any legal or equitable right existed in his favor, he has waived the same in favor of the heirs. If any objection, therefore, exists against the right of the heir to maintain this suit, it must be found in the plain language, spirit and intent of the statute. There is no other reason that could be advanced why the heirs should be compelled to go through the formula and delay of procuring the appointment of a special administrator. It is not pretended that the defendant would be subjected to any peculiar hardship or injustice if the heirs were allowed to maintain this suit instead of the administrator.

If we were confined solely to the phraseology of section 116, it does in terms give support to the conclusions reached by the supreme court of California. But, on the other hand, if we look, as it is our duty to do, at the general scope, object, and intent of the statute regulating the settlement of the estates of deceased persons as an entirety, it supports the opposite view. In our opinion the substantial reason of the law and the great weight of the decided cases—as well as the presumptions of the law—are clearly in favor

Argument for Appellants.

of the right of the plaintiffs to maintain this suit in their own name.

The judgment appealed from is reversed and the cause remanded. The district court will fix a reasonable time within which the defendant will be allowed to appear and file an answer to plaintiffs complaint.

BEATTY, C. J., did not participate in the foregoing decision, being disqualified by consanguinity to a party in interest.

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[No. 903.]

THOMAS M. DICK ET AL., RESPONDENTS, v. B. B. BIRD
ET AL., APPELLANTS.

APPEAL FROM PART OF A JUDGMENT—JURISDICTION.—Where the notice of appeal specifies only a part of the judgment, and is served only upon the parties whose interests would be affected by a reversal of the part specified: *Held*, that this court has no jurisdiction over the other parties, or over the judgment in so far as it affects them.

WATER RIGHTS—FINDINGS SUSTAINED BY THE EVIDENCE—ASSIGNMENT OF ERRORS.—In reviewing the evidence as to the appropriation of water by the respective parties: *Held*, that certain findings were sustained by the evidence, except in immaterial particulars; and that other findings were not incorrect for any reason specified in the assignment of errors.

IDEM—STATEMENT—PARTICULARS MUST BE STATED.—A statement must specify the particulars in which the evidence is alleged to be insufficient, or it will be disregarded.

TITLE BY PRESCRIPTION.—Defendants used water from a certain stream for more than five years prior to the commencement of this action; plaintiffs had been using water from the same stream for a longer period. It did not appear that the use by defendants was adverse to the claims of plaintiffs for more than one or two years immediately prior to the commencement of this suit: *Held*, that defendants could not claim any title to the water by prescription.

APPEAL from the District Court of the Sixth Judicial District, White Pine County.

The facts sufficiently appear in the opinion.

Robert M. Clarke, for Appellants.

I. The decree in this case is void for uncertainty. It is essential to the validity of any decree or judgment that it

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should show with reasonable certainty the nature and extent of the relief granted. (Freeman on Judgments, sec. 50; 1 Bailey (S. C.) 7; 16 Iowa, 47; *Honore v. Colmesnil*, 1 J. J. Marsh. 525.)

II. The testimony shows an adverse, open, continuous, notorious, and exclusive possession by appellants of the land described in their answer, and the water appropriated by them and their predecessors in interest for more than five years next preceding the commencement of this action.

III. The decree does not conform to the prayer of the bill, and is therefore erroneous. (*Ward v. Enders*, 29 Ill. 519; *Olling v. Luitjens*, 32 Id. 23; *Fergus v. Tinkham*, 38 Id. 407; 39 Cal. 688.)

J. B. Barker, also for Appellants.

A. M. Hillhouse, for Respondent.

The notice of appeal in this case is only a complaint that Bird and Fitzhugh failed to get a prescriptive title, and an appeal from the order denying the motion for a new trial. Under this appeal, upon this statement there is nothing for this court to pass upon. (See 4 Nev. 456; *McWilliams v. Hirschman*, 5 Id. 363; Id. 205; *Caldwell v. Greeley*, Id. 258; *Sherman v. Shaw*, 9 Id. 148; *Irwin v. Samson*, 10 Id. 282, 283; 12 Id. 81, 84.)

By the Court, BEATTY, C. J.:

This is a suit in equity to determine the order of priority among numerous appropriators of the waters of Duck creek, in White Pine county.

Two of the defendants, Bird & Fitzhugh, moved for a new trial on the grounds: First, that the evidence was insufficient to justify the findings of the court to the effect that their appropriation was subsequent to the appropriations found to have been made by the plaintiffs and their co-defendant, Horton; and second, that the decision of the court was against law, because it was clearly proven upon the trial that they (Bird & Fitzhugh) were the first appropriators of two hundred inches of the stream, and had by use acquired title thereto by prescription.

Their motion for a new trial was denied, and they have appealed from that order, and also from so much of the judgment as decrees priority of right to Dick and Horton, and from so much thereof as deprives them of the amount of water they claim by prescription.

In support of this appeal two points have been urged by counsel for appellant, which, we think, cannot be considered. They contend that the decree is void for uncertainty, because, instead of distributing the water by inches, it takes, as the basis of apportionment, the quantity necessary to irrigate an acre of ground; and that it is erroneous because it does not conform to the prayer of the complaint, the prayer being for a certain number of inches of water, and the decree being for sufficient water to irrigate a certain number of acres.

These are objections which go to the whole judgment and would, if sustained, reverse it completely, not only as against these respondents, Dick and Horton, but also as to numerous other parties whose rights have been litigated in the action and established by the decree, but upon whom no notice of appeal has been served.

A notice of appeal must be served upon the adverse party or his attorney (C. L., 1392), and must state whether the appeal is from the judgment or a part thereof. (Id.) If the appeal is from the whole judgment, every party whose interest in the subject-matter of the appeal is adverse to, or will be affected by, the reversal or modification of the judgment, is an "adverse party" in the sense of the code, and is entitled to notice of the appeal. (*Senter v. De Bernal*, 38 Cal. 640-1). For two reasons, then, there is in this case no appeal which would authorize us to reverse the whole judgment, even if we thought the objections of appellants were well founded. The notice of appeal specifies only a part of the judgment, and it was served only upon the parties whose interests would be affected by a reversal or modification of the part specified. We have no jurisdiction over the other parties, or over the judgment, so far as it affects them.

The notice of motion for new trial, also, was addressed to

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and served on Dick and Horton alone, and there is, in fact, no complaint of the findings or conclusions of the court, except in so far as they affect the relative rights of the parties to this appeal. We shall therefore confine our inquiry strictly to the points made in support of the motion for a new trial.

There is an objection by counsel for respondent to a consideration of those points, upon the ground that the statement on motion for a new trial did not contain a specification of the particulars in which the evidence failed to justify the findings. This objection, however, is not well founded. The specifications in the statement, although not made in the form usually followed, are, nevertheless, clear and explicit, and respondents were fully advised thereby as to the points to be relied on in support of the motion.

The first objection to the findings is as follows: "The defendants, Bird & Fitzhugh, except to so much of the fifth finding of fact as finds that 'the defendants, Bird & Fitzhugh, and their predecessors in interest, in 1869, used very little, if any, water, but in 1870 used enough to irrigate fifty or sixty acres of grass land, the ditch to convey water not being built until that time. In 1871 and 1872 about the same and ten acres of grain and vegetables,' because the same is contrary to the evidence given on the trial of this cause in this," etc.

This finding is fully supported by the evidence except in one particular. The evidence shows that the predecessors of Bird & Fitzhugh irrigated ten acres of grain and vegetables in 1870, and not that they used water for that purpose in 1871 for the first time. But the error in the finding is immaterial, for it is found, and the evidence fully sustains the findings, that the plaintiff Dick and the defendant Horton made their appropriations earlier in 1870 than the predecessors of Bird & Fitzhugh made theirs on the most favorable view of their testimony. In other words, if the finding of the court had been that Bird & Fitzhugh appropriated water to irrigate ten acres of grain in the spring of 1870, the result, as between them and Dick and Horton, would have been the same, for the evidence fully sustains

the finding of the court that they had made their appropriations even earlier than that, and there is no finding that they increased their original appropriations prior to 1872.

The second finding complained of is to the effect that Dick's appropriation of water sufficient to irrigate two hundred and fifty acres of meadow and one hundred acres of grain, and Horton's appropriation of water sufficient to irrigate two hundred and fifty acres of meadow were prior to any appropriation by the predecessors of Bird & Fitzhugh. The specifications against this finding are as follows: "Because the same is contrary to the evidence given on the trial of this cause in this: That the evidence shows that defendants, Bird & Fitzhugh, appropriated the water of said creek in the month of May, 1869, and that the said William Horton and his predecessors in interest made no appropriation until after that date, and that the said plaintiff, Thomas M. Dick, made no appropriation of the waters of said creek until after the month of May, 1869."

It is true that neither Dick nor Horton claims under an appropriation as early as May, 1869; but Horton's appropriation dates back to the fall of 1869, and Dick's to February, 1870, while Bird & Fitzhugh's is not shown to have been made earlier than May, 1870. These facts are clearly shown by the evidence in the statement, and therefore the finding is not incorrect for any reason assigned in the specification above quoted. Counsel for appellant, however, contends in argument that the finding was erroneous for a reason not assigned in the statement, that is to say, because it gives priority to Dick for a larger amount of water than he had appropriated before Bird & Fitzhugh's appropriation was made. The statement may sustain this point, but it can not be considered. The positive rule of the statute (C. L. 1258) forbids it, and the reasons for enforcing the rule are as strong in this case as they ever are. Dick's stipulation that the statement is correct is qualified by the specifications, and we do not know that he would not have proposed and secured amendments as to the extent of his original appropriation if his attention had been called to that particular point. Under the specifications contained

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in the statement he was bound to propose amendments, if necessary, to show the priority of his appropriation, but he was not bound to see to it, that the testimony as to the exact amount of his first appropriation was all fully set out. For these reasons we think appellant is not entitled to be heard on this point.

The next two exceptions of the appellants are to the refusal of the district judge to find that they made a larger and earlier appropriation than was actually found. As we have before said, the findings of the court upon this point were as favorable to appellants, except in one immaterial particular, as the evidence warranted, and the findings requested were properly refused.

The last exception is to the refusal of the court to find in favor of appellants upon their plea of title by prescription. The evidence in the statement justifies the court in refusing this finding. It is true that the evidence shows, and the court finds, that Bird & Fitzhugh were using water during more than five years prior to the commencement of this action, but it is also true that Dick and Horton were using water for a longer period still, and there is nothing to show that the use by Bird & Fitzhugh was to any extent adverse to the claims of Dick and Horton for more than one or two seasons immediately prior to the commencement of the suit. They were increasing their appropriation year by year, and towards the last Dick and Horton began to experience a scarcity on account of the diversion of water by Bird & Fitzhugh and others who occupy lands above them on the stream. The evidence is, however, all consistent with the view that Bird & Fitzhugh did not, before the irrigating season of 1874, use more water than remained in the stream after deducting all that is claimed by Dick and Horton and the other parties whose appropriations were made prior to their own. If such was the case their use to that extent was subordinate to and entirely consistent with the prior rights of Dick and Horton, and gives no support to a claim by prescription.

The record in our opinion discloses no error prejudicial to the appellants, and the judgment and orders appealed from are affirmed.

Opinion of the Court—Leonard, J.

[No. 904.]

THOMAS M. DICK, RESPONDENT, v. E. CALDWELL,
APPELLANT.

DICK v. BIRD affirmed. The points decided in this case are substantially the same as in *Dick v. Bird*, ante, 161.

APPROPRIATION OF WATER—BENEFICIAL PURPOSE.—A party cannot acquire any right to water not used for any beneficial purpose.

APPEAL from the District Court of the Sixth Judicial District, White Pine county.

The facts appear in the opinion.

Robert M. Clarke and J. B. Barker, for Appellant.

A. M. Hillhouse, for respondent.

By the Court, LEONARD, J.

There were twenty defendants in this case, including Bird & Fitzhugh and E. Caldwell. Bird & Fitzhugh appealed from the decree, etc., and that appeal has been recently decided by this court. Defendant Caldwell also moved for a new trial. That motion was overruled, and he now appeals from the order denying the same, and from "so much of the judgment rendered as gives the said Dick any of the waters of Duck creek used by said E. Caldwell and his grantors, for the period of five years prior to the commencement of this suit, under claim of right, and adverse to the claim of said T. M. Dick."

The notice of motion for a new trial was directed to plaintiff Dick and defendant Horton, but so far as the record shows the facts, it was not served on defendant Horton. The notice of appeal was directed to and served on plaintiff Dick alone. By the decree affirmative relief and definite rights were awarded to the other defendants. Such being the case, the decision in the appeal of Bird and Fitzhugh is decisive of several points raised by appellant: First, that the decree is void for uncertainty, because it takes as the basis of apportionment the quantity of water necessary to irrigate an acre of ground instead of distributing the water by inches; second, that it is erroneous

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because it does not conform to the prayer of the complaint for a certain number of inches of water, the decree being for a sufficient quantity of water to irrigate a certain number of acres. It is sufficient to say that, upon the authority of that opinion, and for the reasons there stated, the two points mentioned are not well taken.

The motion for a new trial was made on the grounds of insufficiency of evidence to justify the decision of the court, and that the same was against law.

The appellant excepted to this portion of the fifth finding of fact, to wit: "That defendant, E. Caldwell, or his grantor, D. R. Pierce, used water from said Duck creek to cultivate six acres of vegetables in 1869, fifteen acres of grain and vegetables in, 1871 twenty acres, in 1872, 1873, 1874 about forty-five acres, in 1875 fifty-seven acres, and during all this time irrigated about ten acres of grass land, and has used the same ever since," "because the same is contrary to the evidence given on the trial of said cause in this," etc. The court evidently intended to find, and did find, the number of acres cultivated and irrigated by appellant each year from 1869 to and including the year 1875. For the years 1869, 1871, 1872, 1873, 1874 and 1875 the findings are clear and definite, and they are fully sustained by the evidence, including the testimony of appellant himself. It is evident that after the words "fifteen acres in grain and vegetables in," the court intended to insert the year—that is, 1870—but by a clerical error the year was left out. No other year could have been intended, and appellant testified that he cultivated fifteen acres in 1870. But it can make no difference if the court did in fact fail to find the number of acres cultivated and irrigated in 1870, for the reason, as we shall see, that as between himself and plaintiff, appellant was awarded the first right to all the water that he appropriated to a beneficial use during the whole period from 1869 to 1875 inclusive.

The next exception is to the court's finding that "plaintiff, Dick, used water to irrigate from two hundred and fifty to three hundred acres of grass land in 1869; this was meadow land upon which the stream naturally flowed; that is to say,

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Dick cut hay from said number of acres which he had taken up. In 1870 and 1871, besides cutting hay, he cultivated fourteen or fifteen acres of vegetables, and in 1872 about ninety acres of grain and vegetables, and has used the same ever since, except when prevented for want of water." The exception is as follows: "Defendant, E. Caldwell, excepts to so much of the fifth finding of fact as finds that the plaintiff, Thomas M. Dick, appropriated any land on Duck creek, or any of the water of said Duck creek in the year 1869, because the same is contrary to the evidence given on the trial in this cause, in this," etc. Although the facts did not justify the exception as stated, yet it makes no difference if they did. It is a matter that does not concern appellant. If he received all the rights that belonged to him he cannot complain, even though it is a fact that plaintiff received more than he was entitled to. The next exception is to the refusal of the court to find as a fact, that "appellant and his grantor in July, 1869, appropriated two hundred and seven inches of the water of Duck creek, by cutting one ditch carrying seventy-five inches of water, and one other ditch carrying one hundred and thirty-two inches of water; that the water was diverted from said creek and used by appellant to irrigate vegetables and meadow land in 1869, and in 1870 to irrigate fifteen acres of grain and vegetables and ten acres of grass land; that said amount of water was used continually from July, 1869, to the commencement of this suit, and was necessary, each season, to irrigate the land cultivated by him."

The court took as the basis of apportionment the quantity necessary to irrigate an acre of ground, instead of distributing the water by inches. It was therefore unnecessary to find the number of inches diverted and appropriated by appellant, even though the proof warranted the finding that he did divert two hundred and seven inches, and did continue to divert the same from 1869 to 1875. Such a finding would not have assisted the court in rendering its decree, apportioning to each party water for such number of acres as he was entitled to. Besides, the court was justified in refusing to find that all water diverted by appellant from

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1869 to 1875, inclusive, was necessary to irrigate land cultivated by him. Such was not the fact shown by the testimony. The court finds that in 1874 and 1875, appellant used more water than he was entitled to use, and that he wasted large quantities thereof, to which the plaintiff and several of the defendants were entitled, and no exception was taken to that finding.

The last exception is to the refusal of the court to find for appellant upon his plea by title of prescription. The facts relating to that question are the same in this appeal as they were in *Bird and Fitzhugh's*, and for the reasons there stated, we must hold that the exception is not supported by the facts.

As we have seen, so far as plaintiff is concerned, appellant is awarded the first right to water from Duck creek for the irrigation of fifty-seven acres of grain and vegetables, and ten acres of grass.

It is plain from his own testimony that he was entitled to no more, because, during that whole period, he did not cultivate or irrigate but that number of acres, and he could not have used beneficially any more water than was necessary to irrigate the same. He did not appropriate, in a legal sense, any water except such as he used beneficially. Turning water out of the stream for no useful purpose did not give him any additional rights. If he had, from 1869 to and including 1875, turned two hundred and seven inches of water from the stream and made no use of any portion of it, it can not be claimed that he would have been entitled to a decree for any amount by reason of actual appropriation. Turning more water from the stream than he used was waste, not appropriation. He received water for every acre he cultivated in grain or vegetables, or irrigated for grass, from 1869 to the commencement of the suit. Certainly he can claim no more. Plaintiff received water, subject to appellant's first use, for no greater number of acres than he had cultivated and irrigated from the creek. We think appellant has no just complaint against the decree as between him and respondent, and we find no errors prejudicial to him.

The order and judgment appealed from are affirmed.

Opinion of the Court—Leonard, J.

[No. 914.]

R. S. GAMMANS, APPELLANT, v. M. A. ROUSSELL ET AL., RESPONDENTS.

CONFLICT OF EVIDENCE—FINDINGS.—Where there is a substantial conflict of evidence, the findings of the lower court will not be disturbed.

STATEMENT NOT CONTAINING ALL THE EVIDENCE. — Where the statement does not show that it contains all the evidence, it will be presumed that the findings were supported by the evidence.

APPEAL FOR DELAY—RULE AS TO DAMAGES ENFORCED.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts appear in the opinion.

W. Webster and R. M. Clarke, for Appellant.

Thomas E. Haydon, for Respondent.

By the Court, LEONARD, J.:

This is an action to determine the ownership and right of possession of an undivided one-sixth part of a certain water-ditch known as the "big ditch," in Washoe county. The case was tried by the court without a jury. The findings were all in favor of the defendants, who had judgment against plaintiff upon the merits and for their costs.

Plaintiff moved for a new trial on the grounds, first, that the findings of the court were not sustained by the evidence; second, that the judgment was against law and the evidence; third, error in law occurring at the trial and excepted to by plaintiff. The motion for a new trial was denied "upon the grounds that the statement as settled and certified after its engrossment does not show any particulars in which the evidence is insufficient to justify the findings and decree; that it does not show that it contains all the evidence given upon the trial, and does not disclose any error in law occurring at the trial, excepted to by the plaintiff, that is material, or for which such findings and decree should be set aside." There was an attempt to put in the statement a specification of particulars in which the evidence was alleged to have been insufficient. But we need not stop to

Points decided.

inquire whether or not such specifications are sufficient to justify us in considering the statement. If they are deemed sufficient upon the point that the findings are against the evidence, still the fact plainly appears that the evidence of plaintiff and defendants conflicts upon the most material questions in the case. The findings, therefore, cannot be disturbed. Besides, it does not appear that the statement contains all the evidence; consequently, the findings will be presumed to have been supported by the evidence. The only error in law complained of, and the only specification thereof, is as follows: "The court erred in that the judgment is against law, because of plaintiff's right to the water in question, because of his title thereto being already established." If that can be regarded as a specification of error in law, still it is useless, because it is based upon the evidence in the case, and, as before stated, it does not appear that it is all contained in the statement. This appeal is without any merit, and in my opinion it was taken purely for delay. The judgment and order appealed from are affirmed, and each of the defendants is allowed and awarded ten per cent. on the amount of his judgment as damages for the delay occasioned.

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[No. 924.]

ELIAS JONES, APPELLANT, v. THE SAN FRANCISCO
SULPHUR COMPANY, RESPONDENT.

DEFAULT—MISTAKE IN NAME OF CORPORATION—SECTION 68 PRACTICE ACT.—

Defendant was sued and served with process as "The San Francisco Sulphur Company." It suffered default. At a subsequent term it specially appeared under its true name of "The San Francisco Sulphur Mining Company," and moved to set aside the default, upon the ground of the technical mistake in its name: *Held*, it appearing that defendant had not complied with the law by filing a copy of its certificate of incorporation, that the practice act was only intended to apply for the benefit of those who have a meritorious defense, and who offer to make it, and not to those who offer a mere technical excuse for not answering in time.

APPEAL from the District Court of the Fourth Judicial District, Humboldt County.

The facts are stated in the opinion.

Bonnifield & French and R. M. Clarke, for Appellant.

A. W. Fisk, for Respondent.

By the Court, BEATTY, C. J.:

This action was commenced in the fourth district court, Humboldt county, at the June term, 1877. The complaint was filed August 6th, and according to the sheriff's return, the summons, together with a certified copy of the complaint, was served on E. McWorthy, "superintendent and agent" of defendant in Humboldt county, on the seventh day of August. Copies of the summons and complaint were also mailed to the defendant at San Francisco, its principal place of business. There was no appearance on the part of defendant, and on the sixth of September its default was entered. The following day judgment was taken for the amount demanded in the complaint, and on the eighth of September execution issued. All this took place at the June term. On the seventeenth day of January, 1878, during the October term of the court, "the San Francisco Sulphur Mining Company" served upon plaintiff's attorney the following notice:

"You will please take notice that on the fourth day of March, A. D. 1878, at the court-room of the above-entitled court, at the court-house in Winnemucca, at 10 o'clock A. M. of said day, or so soon thereafter as counsel can be heard, the San Francisco Sulphur Mining Company, a corporation, will, by its attorneys, appearing specially for that purpose only, move the court to vacate and set aside the judgment and default and to quash the execution heretofore entered and issued at the instance and request of the above-named Elias Jones as plaintiff, in an action entitled, *Elias Jones v. The San Francisco Sulphur Company*, and to vacate and annul all orders and proceedings had in said action subsequent to the filing of the complaint and the issuing of summons therein, and for costs, on the ground that, by said action, it was intended to sue the San Francisco Sulphur Mining Company; and there is not now, nor ever was, any

company or corporation known as the San Francisco Sulphur Company; that no service of summons in said action was ever had or made upon the San Francisco Sulphur Mining Company; that said corporation never, in any way, appeared in said action, and that the said court never had jurisdiction of said corporation."

On the sixteenth of April, 1878, and at the February term of the court, an order was made which, after reciting the special appearance of the San Francisco Sulphur Mining Company, sustained its motion on the grounds stated in the notice. The statement on appeal shows that, on the hearing of the motion, a good deal of evidence was produced going to show that the defendant is a California corporation, called, in its certificate of incorporation, the San Francisco Sulphur Mining Company, but that in Humboldt county, where its sulphur mine is situated, it calls itself, and is generally known as, the San Francisco Sulphur Company, as it is designated in the complaint. It does not appear to have ever complied with the law (Stats. 1869, p. 115), by filing a copy of its certificate of incorporation with the recorder of Humboldt county. It was also proven that E. McWorthy was not the regular superintendent of the company, although he was actually in charge of its business at the sulphur mine at the time he was served with summons. It was conclusively shown on the other hand, and not denied, that the officers of the corporation actually received the copies of the complaint and summons which were mailed to San Francisco, and that they were well advised of the pendency and nature of the action before the time for answering had elapsed.

Upon this state of facts we think the district court erred in sustaining defendant's motion. The general rule is that a court can not set aside or modify a judgment after the lapse of the term at which it was rendered, unless a motion to that effect was made during the term. (*Daniels v. Daniels*, 12 Nev. 118.) The sole exception to this rule is the case provided for in the last clause of section 68 of the practice act, where the defendant has not been personally served with summons. (*Casement v. Ringgold*, 28 Cal. 336.) But

Argument for Appellant.

in that case the court is only authorized to allow the defendant to "answer to the original merits of the action." This defendant has asked for no such relief, nor has it made any showing which would entitle it to relief under the provision in question, which was intended for the benefit of those who have a meritorious defense and who offer to make it, who for that purpose acknowledge and submit themselves to the jurisdiction of the court by appearing generally in the action, and who are able to offer a substantial, and not a merely technical excuse, for failing to answer in time. It was not intended to help those who, like this defendant, having actual knowledge of the pendency of the suit, and relying upon a misnomer or some such technical objection to the process, have waited until judgment has been entered, execution issued and large expenses incurred, and have then appeared specially for the mere purpose of moving to quash the proceedings with no other apparent object than to subject the plaintiff to useless costs and vexatious delays.

The order appealed from is reversed.

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15	181

[No. 907.]

H. A. GASTON, RESPONDENT, v. F. V. DRAKE,
APPELLANT.

AGREEMENT TO DIVIDE THE FEES OF AN OFFICE VOID, AS AGAINST PUBLIC POLICY.—An agreement made before election to divide the salary, fees, and emoluments of the office of district attorney—the consideration for said agreement being that the plaintiff should use all his influence to secure the election of the defendant to said office, is void, as against public policy.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts are stated in the opinion.

Lindsay & Dickson, for Appellant.

I. The contract between plaintiff and defendant is opposed to public policy, in contravention of the election law of this state, and wholly void.

Argument for Appellant.

The salary of an office of trust, or of an office concerning the administration of justice, are not the subject of sale; such sale is opposed to public policy and void at the common law. (*Wells v. Foster*, 8 M. & W. 148; *Palmer v. Bate*, 2 B & B. 673; E. C. L. R. vol. 6; *Flarity v. Odium*, 3 T. R. 681; *Lidderdale v. Duke of Montrose*, 4 T. R. 248; *Aston v. Guinnell*, 3 Y. & J. 147; Story on Contracts, vol. 1, sec. 709; *Spense v. Harvey*, 22 Cal. 340; *Faurie v. Morin*, 6 Amer. Dec. 701; *Eddy v. Capron*, 4 Rh. Isl'd, 394.)

Such contracts tend to corrupt electors, poison the source of political power, and are therefore void. (*Martin v. Wade et al.*, 37 Cal. 168; *Nichols v. Mudgett*, 32 W. 546; *Swayze v. Hull*, 3 Hal. 54.)

II. A promise to use one's influence with the appointing power to secure the appointment of another to a public office in consideration of a portion of the salary and emoluments of the office, is a void contract. (*Lewis v. Knox*, 2 Bibb. 453; *Carlton v. Whicher*, 5 N. H. 196; *Meacham v. Dow*, 32 W. 721; *Gray v. Hook*, 4 N. Y. 449; *Ferris v. Adams*, 23 Vt. 136; *Haas v. Fenlon*, 8 Kan. 601; *Faurie v. Morin*, 6 Amer. Dec. 701.)

The courts should be vigilant in seeking to insure purity in elections, upon which the stability of the government itself depends. (*Mills v. Dolsen*, 40 N. Y. 543.)

It matters not how pure the intentions of the parties may be in entering into a contract of this kind, the answer to the inquiry, Is there anything pernicious in its tendency? must determine the question of its legality. (*Mills v. Dolsen*, *supra*; *Atcheson v. Mallon*, 43 N. Y. 147; *Tool Co. v. Norris*, 2 Wal. 45; 18 Pick. 472; 34 Vt. 281; 48 N. Y. 348; *Weed & Clark v. Black*, 3 Cent. L. J. 34.)

III. Such contracts are in contravention of the election law of this state. (C. L. Nev., secs. 2591, 2592, 2593, 2594.)

IV. The contract is entire. If part therefore of the consideration is illegal the whole contract is void. (2 Chitty Con. (Am. ed.), p. 973, and cases cited in note G.; 1 Pars. Con. (sixth ed.), p. 456 *et seq.*)

V. In the absence of an agreement there would be no partnership in the office. (*King v. Whiton*, 15 Wis. 684.)

Argument in Reply.

Lewis & Deal, for Respondent.

I. The finding of fact relied upon by appellant was utterly unwarranted by the pleadings and issues and is therefore nugatory. Findings of fact should always be simply the conclusions arrived at by the court upon the issues of fact presented by the pleadings. (*Morenhout v. Barron*, 42 Cal. 605; *Gregory v. Nelson*, 41 Id. 284; *Burnett v. Stearns*, 33 Id. 474.)

II. If the fact that Gaston agreed to aid Drake in securing his election be a material fact, and rendered the agreement void, that fact should have been pleaded. If the contract independent of that element was valid, then defendant should have alleged the fact that such promise was a part of the contract, and that by reason thereof the entire contract was rendered void.

III. The evidence does not bring the case within the provisions of section 2592, section 2593, or 2594, of the compiled laws.

IV. These provisions of the statute are penal; the court must therefore construe them strictly. By the rules of construction of such statutes only such cases are held to be within them as come within the very letter of the law. (23 Iowa, 304; *Lair v. Killmer*, 1 Dutch, 522; *Dwarris on Statutes*, 634.) To hold that the contract entered into between these parties is void under the statute necessarily involves the conviction of the defendant of a very serious crime, when as a matter of fact no one can believe, after examining the evidence, that anything criminal or wrong was thought of by either party.

V. A contract for the division of fees is valid and must be upheld. (*Mott v. Robbins*, 1 Hill. 21; *Becker v. Ten Eyck*, 6 Paige, 68; 7 Bac. Abr. 301; 3 Minn. 413.)

Lindsay & Dickson, in Reply.

The respondent made no exception to the findings, did not move for a new trial, nor has he appealed, therefore he can not be heard to allege any error committed by the court below, nor to object to any finding, nor to the want of a finding. (*Jackson v. F. R. Water Co.*, 14 Cal. 18; *Seward*

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v. *Malotte*, 15 Id. 304; *Paul v. Magee*, 18 Id. 698; *Poppe v. Alhearn*, 42 Id. 606.)

By the Court, LEONARD, J.:

It is alleged in the complaint that plaintiff and defendant, on or about February 3, 1876, formed and entered into a copartnership to practice law in Storey county and state of Nevada; that by the terms of the contract of partnership, each was to share equally, share and share alike, in all the labors of practice, and in the fees and profits arising therefrom; that in the fall of 1876, by and with the advice and consent of plaintiff, defendant became a candidate for the office of district attorney of Storey county; that it was agreed between plaintiff and defendant that if defendant should be elected to said office, the said copartnership should continue upon the terms above stated, and that said partners should share equally, share and share alike, in the profits, fees, and emoluments of said office and business; that defendant was elected on the seventh day of November, 1876, and on the second day of January, 1877, he duly qualified and entered upon the discharge of the duties of said office; that from time to time thereafter plaintiff greatly assisted defendant in performing the duties of said office, upon the request of the latter, and upon his promise to divide the proceeds equally with plaintiff; that plaintiff has performed his every duty in said partnership and in said office, and has divided equally with defendant all fees and moneys which came into his hands belonging to said partnership; that during its existence, defendant received about the sum of thirteen thousand two hundred and twenty-five dollars and twenty-four cents as fees belonging to said partnership, in excess of his just share; that though often requested so to do, he has refused and failed to settle and account with plaintiff, or to pay to plaintiff any part of said proceeds of said partnership. Plaintiff prays for an accounting and settlement, and that defendant be required to pay over to him one half of the fees and profits of the partnership stated in the complaint, to wit, six thousand six hundred and twelve dollars and sixty-two cents. Defendant demurred to

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the complaint generally and specifically, and the demurrers were overruled. In his answer he admits the contract of partnership first alleged, but denies specifically each and every material allegation of the complaint in relation to the alleged contract, or any contract or agreement concerning the office of district attorney, or any division of fees or profits thereof.

The court called a jury to decide this special issue, to wit: "Did the plaintiff and defendant enter into an agreement, or have an understanding, that they should divide equally the profits and emoluments of district attorney of Storey county?" Upon the issue submitted, the jury found for plaintiff. It is said by defendant that they so found in consequence of an instruction claimed to be erroneous; but as we view the case, that need not be considered. The court, in terms, adopted and confirmed the verdict, and an accounting was ordered and had between the parties. Among other facts, the court found the following: "That on or about September 1, 1876, after the defendant had become a candidate for the office of district attorney of Storey county, and before he was elected thereto, the plaintiff and defendant entered into an agreement to divide the salary, fees, and emoluments of said office; that the consideration for said agreement was that the plaintiff should use all his influence to secure the election of the defendant to said office, and in the event of the election of defendant to said office, to assist him in the performance of the duties of said office; that said partnership and agreement terminated on the fifth day of April, 1877; that about said date, plaintiff notified defendant that he was ready to assist in closing all business then pending; that upon full accounting there was in the hands of plaintiff, or had been collected by him, of the partnership assets, the sum of six hundred and ninety dollars, and by defendant, of partnership assets and salary and fees belonging to said office of district attorney, the sum of seven thousand one hundred and fifty-six dollars, of which six thousand seven hundred and five dollars were derived and collected from the salary and fees of said office; that there was then due from defendant to plaintiff the sum

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of three thousand two hundred and thirty-three dollars, being one half of the balance in his hands, over and above what was collected by plaintiff." As a conclusion of law, the court found that plaintiff was entitled to judgment against defendant for the sum of three thousand two hundred and thirty-three dollars, together with his costs. Judgment was entered accordingly, and this appeal is taken from an order overruling defendant's motion for a new trial, and from the judgment.

It is proper to state that it appears from the complaint that the sum of thirteen thousand two hundred and twenty-five dollars and twenty-four cents, one-half of which was claimed as being due to plaintiff, was made up of fees appertaining to the district attorney's office. Of the six hundred and ninety dollars collected by plaintiff, it does not appear that any came from fees of that office; while from the court's findings, it appears there were four hundred and fifty-one dollars in defendant's hands that did not come from that source.

It is urged by counsel for defendant that the contract alleged to have been entered into between plaintiff and defendant, and that found by the court, were and are opposed to public policy, in contravention of the election law of the state, and wholly void.

It is claimed, on the other hand, by counsel for plaintiff:

1. "That the finding, that a part of the consideration for the contract was a promise by plaintiff to use all his influence to secure the election of defendant, was unwarranted by the pleadings, is wholly nugatory, and can not be considered by this court; that if the fact that plaintiff agreed to use his influence was a material fact, and rendered the agreement void, it should have been pleaded; that defendant should have alleged that such promise was made, and that by reason thereof, the entire contract was rendered void; 2. That the contract set out in the complaint, and the only one the court had power to find, is valid." For reasons that will subsequently appear, we think it unnecessary to decide whether or not, in fact, the findings of the court above stated and objected to by the plaintiff's counsel were

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within the issues made by the pleadings. All of plaintiff's testimony showing the agreement and the consideration therefor is in the statement, and it is not said and can not be claimed, that there is no evidence to sustain the court in its findings. Plaintiff's testimony in chief was voluntarily given by him, and no objection was made, or could have been made, to any question asked upon his cross-examination. Keeping in mind these facts, we will first consider plaintiff's objection to the court's finding, and to a consideration of the same by this court.

It cannot be doubted at this day, nor is it denied, that a contract will not be enforced if it is against public policy, or that, if a part of the consideration of an entire contract is illegal as against public policy or sound morals, the whole contract is void. (*Garforth v. Fearon*, 1 H. Bl. 327; *Powers v. Skinner*, 34 Vt. 281; Story's Eq. Jur. vol. 1, secs. 296, 298; *Carlton v. Witcher*, 5 N. H. 198; *McCausland v. Ralston*, 12 Nev. 212.) Nor does it matter that nothing improper or illegal was done, or was expected to be done, under the contract; the principle is controlled by the tendency of the contract. (*Powers v. Skinner*, *supra*; *Atcheson v. Mallon*, 43 N. Y. 149; *Richardson v. Crandall*, 48 Id. 362; *Clippinger v. Hepbaugh*, 5 Watts & S. 321; *Spence v. Harvey*, 22 Cal. 339.)

Courts refuse to assist either party to such contracts, and they refuse to hear such cases, in the interest of the public, not for the sake of plaintiff or defendant. (*Holman v. Johnson*, 1 Cowp. 343.) No principles are better settled than those above stated.

Valentine v. Stewart, 15 Cal. 389, was a suit in equity to compel a specific performance of a contract concerning lands. After the testimony was, in the court below, of its own motion, dismissed the case, on the ground that the agreement, or a part of it was in, violation of public policy.

In that case, counsel for appellant advanced the views that counsel for plaintiff do in this case. They said in their briefs: "But the court below founded its decree upon supposed facts nowhere alleged in the pleadings. This was clearly erroneous. A court of equity can not found its de-

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cree upon a fact not alleged in the pleadings, however clearly it may be made out in evidence. * * * But it is contended * * * that whenever it appears to a court that a contract which is brought before it is against public policy, it will refuse to entertain any suit upon it. * * *

“It is true that when it so appears to the court the court will eject the cause ; but then, nothing appears to the court that is not on the record. But if it is meant to assert that a court will decide a contract to be *turpis contractus* when no fact is alleged upon the record which makes it so, there is no foundation for the assertion.”

Counsel for respondent, in their brief, said: “The only question is, whether the fact appearing by evidence properly given under the issues raised by the pleadings, that the consideration was an immoral one, and the contract one which is against public policy, the court should refuse to enforce performance, where the objection is not specifically raised and made a ground of defense.”

We have quoted from the briefs of the respective counsel for the purpose of showing that the point raised there was like the one urged by counsel for plaintiff in this case, and now being considered. In that case the contract set up in the bill was legal, but contemporaneously an illegal contract touching the same matter was executed by the same parties, which was decided to be against public policy, and void. The contract last named was not set out in the bill, but was disclosed by the proofs. The court said: “This is a case of more than ordinary importance, and presents features of peculiar interest. The plaintiffs file a bill for the specific execution of a certain agreement which they set out. Upon the pleadings and proof the district judge dismissed the bill upon the ground that the agreement, as disclosed in the proofs and the facts connected therewith, showed the contract sought to be enforced was in contravention of public policy and void, and that the court would refuse to execute it, though this defense was not specifically or otherwise set up in the pleadings.”

After considering the nature of the cotemporaneous contract, and deciding that it was void for the reason men-

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tioned, and that the contract which plaintiff was endeavoring to enforce was void also, for the reason that it was wholly or in part executed in consideration of the making of the void contract contemporaneously made, the court further said: "No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. * * * The authorities and the reason of the rule leave no question as to the right of a court, and its duty, to dismiss from its consideration a case based upon a consideration which contravenes public policy. Courts do not sit to give effect to such illegal contracts. The law is not to be subsidized to overthrow itself, though the parties to the litigation may not object to such a meretricious exercise of power. If the public time and the authority of law were thus at the mercy of litigants, the sense of dignity and obligation to the laws, from which the court derives its powers, would constrain it to desist from the suicidal task of subverting the laws which it was organized to preserve and administer." (See, also, response to petition for rehearing in same case, and *Abbe v. Marr*, 14 Cal. 211; *Hatzfield v. Gulden*, 7 Watts, 154; *Holman v. Newland*, 1 Cowp. 341.)

We fully agree with the views expressed in the decision from which we have quoted so liberally. It is undoubtedly the general rule in law and equity that the findings must be warranted by the pleadings. So the cases cited by respondent hold. (42 Cal. 605; 41 Id. 284; 33 Id. 474.) But in neither of those cases was it claimed or held that the contract sued on was opposed to public policy. In neither was the public especially interested. Admitting that in such cases the court must base its findings upon the issues made by the pleadings, it does not follow that it must do so in cases where relief is denied, not for the sake of the defendant, but because it is for the public interest to refuse

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to entertain the case. All the authorities hold that contracts against public policy should not be enforced, because it is for the public good to leave the parties where they have voluntarily placed themselves. In such cases the court must act for the public, if the defendant does not, and refuse to assist either, "if from the plaintiff's own stating or otherwise the cause of action appears to arise *ex turpi causa*."

The court having found that a portion of the consideration of the contract on the part of plaintiff was that he should use all his influence to secure defendant's election (as it was its duty to do if the evidence justified such a finding), it then became its duty to dismiss the suit if such a contract was opposed to public policy. It becomes necessary, then, to ascertain the nature of such an agreement.

We shall first consider it as found by the court, including the portion objected to; and second, with that part excluded, or as it is alleged in the complaint.

It is hardly claimed by counsel for plaintiff that a contract like the one found by the court, a part of the consideration of which was an agreement by plaintiff to use all his influence to secure defendant's election, can be sustained or enforced. But it is urged, as before stated, that such a finding was nugatory, and cannot be considered by this court. Having arrived at an opposite conclusion upon that point, we shall content ourselves with a summary disposition of the question as to the validity of the contract found by the court. It is undoubtedly void, as contrary to public policy. It was in terms a promise to use not only personal effort, but personal influence, among the voters of Storey county to secure defendant's election. Its influence upon plaintiff was the same as though defendant had promised to give him a definite sum of money in case of election. Success would bring reward, while defeat would result, not only in loss of coveted profits, but time and labor as well. By it plaintiff's love of gain was stimulated, and a great temptation placed before him to promote his own interests regardless of public good. In *Gray v. Hook*, 4 Comst. 454, Hook agreed to withdraw his application for an office and

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aid Gray in securing the appointment, in consideration of which Gray was to allow Hook one half of the fees and emoluments of the office as long as Gray held it. The court said (p. 457): "I think that this contract was void, because it stipulated that Hook should have a pecuniary compensation for withdrawing his application, by which he had probably driven off all competition and contributed to reduce the number of applicants to himself and Gray. I have no doubt that it is void, because it is stipulated that Hook should have a pecuniary compensation for aiding Gray to obtain the appointment. And I have no doubt that any agreement between two citizens by which one stipulates to pay the other a proportion of the fees and emoluments of a public office which he is seeking, in consideration that the other will aid him in obtaining it, is void."

In *Clippinger v. Hepbaugh*, 5 Watts & S. 315, it is said that "a contract to procure, or endeavor to procure, the passage of an act of the legislature by any sinister means, or even by using personal influence with members, is void, as being inconsistent with public policy and the integrity of our public institutions. And any agreement for a contingent fee, to be paid on the passage of a legislative act, would be illegal and void, because it would be a strong incentive to the exercise of personal and sinister influences to effect the object."

Mills v. Mills, 40 New York, 543, was an action upon a contract to convey certain lands to plaintiff, the consideration of which was that plaintiff "should give all the aid in his power, spend such reasonable time as might be necessary, and generally use his influence and exertions to procure the passage into a law" of a certain bill. The defendants put the principal allegations of the complaint in issue by their answers, and upon the hearing, the pleadings and agreement were read in evidence. Defendants moved to dismiss, and the motion was granted upon the ground that the agreement was illegal and void. Judgment was entered, and on appeal it was affirmed.

See also *Powers v. Skinner*, 34 Vt. 280; *Fuller v. Dane*,

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18 Pick. 479, 481; *Wood v. McCann*, 6 Dana (Ky.), 369, 370; vol. 1 Story's Eq. Ju., sec. 293, b.; *Faurie v. Morin*, 4 Martin, 39; *Carlton v. Whitcher*, 5 N. H. 196; *Nicholls v. Mudgett*, 32 Vt. 546; *Marshall v. Baltimore and Ohio Railroad Co.*, 16 How. (U. S. R.), 333; *Haas v. Fenlon*, 8 Kan. 604; *Martin v. Wade*, 37 Cal. 174.

The tendency of a contract for a contingent reward, to use one's influence to secure another's election to a public office, is as certainly detrimental to the public interest as is a contract to use personal influence to procure the passage of a law, or to obtain a pardon.

This brings us to a consideration of the contract as stated in the complaint, stripped of the illegal promise just noticed. And with the circumstances attending its making, it may be stated thus: A short time before the primary election, when plaintiff and defendant were partners in the practice of law, both being of the opinion that if defendant should be elected, their business, both civil and criminal, would be greatly increased, they agreed that defendant should run for the office of district attorney, and if elected, they should share, equally, the labors and profits; or, to state it in the language of counsel for plaintiff, they agreed that "if Drake was elected, Gaston was to aid him in the business of the office, for which services he was to receive one half of the fees," etc. Was such a contract valid, or void, as against public policy? What was its tendency, whether entered into by honest, or by designing and corrupt men? We are referred by counsel for plaintiff to cases decided under statutes against buying and selling offices, wherein it is held that a principal holding an office may make a deputation, reserving a portion of the salary or fees to himself, and give the balance to his deputy for services. (*Mott v. Robbins*, 1 Hill, 21; *Becker v. Ten Eyck*, 6 Paige, 68; 7 Bac. Abr. 301.) Also, that a sheriff may give to his deputy all the fees pertaining to the services he may render as such. (*Printing Co. v. Sanborn*, 3 Minn. 418.) But in all of those cases the deputation was made after the election of the principal, and therefore the appointment or

promise to appoint could not have had an influence upon his election.

We shall not discuss the question whether the contract now under consideration would have been valid or void if made after election. That is not our case. Plaintiff testified, among other things, that when defendant first spoke to him about running for the office, defendant said: "I think if you and I stand in for the office together, we have got friends enough to secure the nomination and election. I wish you would think it over till to-morrow, and if, on reflection, you are willing, we will stand in for it;" that plaintiff replied: "Mr. Drake, the idea strikes me favorably, and suppose I should come to a favorable conclusion, what effect is it going to have on our partnership?" That defendant replied: "The only effect it would have, it will bring in more business, all the business we can attend to. * * * The salary is two thousand dollars per year, and five hundred dollars coming in every three months is no little item to be divided; and the salary and tax suits and the business of the criminal cases, together with the civil business that will naturally come to us, will build up a business that will amount to thousands of dollars per year." * * *

Plaintiff says he thought the matter over until the next morning, when he told defendant that he had come to a favorable conclusion; that he then said to defendant that he "had a great many old California friends that lived here, * * * and old Washoe friends, and he thought they would do anything honorable to advance his interests, irrespective of party principles;" that defendant then said to him: "If we go in for this office and I am to be a candidate, I shall want all my time from now till election." He says he gave him all his time and attended to the business himself; that he let defendant use all the money that they had on hand and all that came into the office, to use for his election. He further testified that he did use all his influence to secure defendant's election, and he stated the reason why he did so, although he said, at last, that there was no agreement that he should do so. The reason he gave why he used all his influence was, that he "supposed he was pro-

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moting his own interests." Then, so far as plaintiff was concerned, the incentive that moved him was self-interest and not the general good; and, too, he was induced to do what he did do, by the fact that he was to share the profits, and that defendant's election would increase their business. So, in this case, at least, the tendency of the contract stated in the complaint was to induce plaintiff to use all his influence for defendant's election, even though he did not agree to do so, as found by the court. And such was its natural tendency. This arrangement may have induced him to influence ten men, or a hundred, to vote for defendant in opposition to preconceived political principles, and fixed ideas of right and duty; and, too, when they may have preferred his opponent as an incumbent of the office. Such a contract can not be upheld. Its tendency was to corrupt the people upon whose integrity and intelligence the safety of the state and nation depends—to lead voters to work for individual interests rather than the public welfare. In my opinion, in the majority of cases, men will work as industriously, under an agreement that they shall assist in performing the labors, and share in the profits, of an office, if another is elected, as they would if a promise to use all their influence should be subjoined. With most men, self-interest is among the strongest incentives to effort, and it requires no added promise to act as a stimulating influence.

In *Mood v. McCann*, *supra*, the court said: "There having been no plea or defense in the court below, the only clue to a decision of the case is furnished by the declaration and note as described in it; and had these shown that the fee, or any portion of it, depended on the passage of the legislative acts, or either of them, we should be clearly of the opinion that the contract should be deemed illegal and void; because a contingent fee is a direct and strong incentive to the exertion of not merely personal, but sinister, influence upon the legislature, and therefore public policy forbids the legal recognition of any such contracts, upon the same principle on which it interdicts wagers on elections and contracts for procuring pardons."

And in *Fuller v. Dame*, *supra*, it is said that "the law goes

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further than merely to annul contracts where the obvious and avowed purpose is to do or cause the doing of unlawful acts; it avoids contracts and promises made with a view to place one under wrong influences—those which offer him a temptation to do that which may injuriously affect the rights and interests of third persons." See authorities before cited. If there are any contracts upon which courts should "put the stamp of their disapprobation," it is those curtailing or tending to curtail a free exercise of the elective franchise. The contract stated in the complaint, as well as that found by the court, were of that character, and neither can be upheld or enforced.

The judgment and order appealed from are therefore reversed, and the court below is directed to enter a judgment of dismissal, defendant to recover his costs.

BEATTY, C. J. concurring:

The evidence in this case did not, in my opinion, warrant the finding of the district court, to the effect that Gaston's promise to use his influence to procure Drake's election was a part of the consideration for the promise of the latter to divide the emoluments of the office. The parties were practicing law in partnership at the time when Drake asked Gaston's advice as to his becoming a candidate for the office of district attorney. Gaston first inquired what effect it would have on their partnership if Drake should be elected. The reply was, in substance, that it would have no other effect than to increase their business by the addition of the business and profits of the district attorney's office.

It was thus definitely settled that in the case of Drake's election their partnership should continue, and should embrace the fees and salary of the office before a word had been said about Gaston's helping him to win the election, and before it had even been decided that he should run. On the following day Gaston, having weighed the chances of success, advised Drake to come forward as a candidate, and promised his hearty support and assistance. He did assist him to the best of his ability, and frankly stated that

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one motive for his doing so was his belief that he was thereby advancing his own interests. This is the sum and substance of the testimony, and to my mind it completely fails to show that Drake promised to divide the profits of the office because Gaston promised to help him to get it. What he did was to promise to divide the profits if Gaston would help him perform the duties of the office. If this promise had been made after the election, instead of before the election, it would have been entirely free from any taint of illegality; and if it must be held void and incapable of enforcement, it is not because there is any evidence that Drake expressly bargained for Gaston's influence in aid of his election, but because, and only because, courts are bound to discountenance contracts of this character on account of their tendency to induce the exertion of improper influences upon the election of public officers. Upon this point—the last discussed in the foregoing opinion—I concur in the conclusions and judgment of the court. Upon the others I express no opinion.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF NEVADA.
APRIL TERM, 1879.

[No. 910.]

FREDERICK FREVERT, RESPONDENT, *v.* CHARLES
HENRY, APPELLANT.

JUDGMENT MUST CORRESPOND WITH PLEADINGS.—A judgment must accord with and be warranted by the pleadings of the party in whose favor it is rendered.

IDEM—JUDGMENT-ROLL.—An objection that the judgment is not authorized by the pleadings may be taken upon the judgment-roll alone.

PROMISSORY NOTE—PAYMENT OF BY SURETY—RIGHTS OF SURETY.—Where a surety pays a promissory note, and has the same assigned to him, and commences an action upon the note: *Held*, that he is entitled to maintain an action of implied assumpsit for the amount paid, but he can not sustain an action upon the note.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

T. Coffin and Ellis & King, for Appellant:

I. The objection that the judgment is not supported by the pleadings can be taken and heard upon the judgment-roll alone. (*Putnam v. Lamphier*, 36 Cal. 151, 158; *Jones v. Petaluma*, 36 Cal. 230; *Bachman v. Sepulveda*, 39 Cal. 688.)

II. The payment of a note by any one of the makers, extinguishes the note, and renders it *functus officio*: The

Argument for Respondent.

surety can not sue upon the contract expressed in the note to recover money of the principal which he has been compelled to pay. He can only recover upon the contract which the law implies from the circumstances. (*Gordon v. Wansey*, 21 Cal. 77; *Smith v. Johnson*, 23 Id. 64; 2 Pars. on N. & B. 237; *Bryant v. Smith*, 10 Cush. 169; *Pray v. Maine*, 7 Id. 253; *Long v. Bank of Cynthiana*, 1 Litt. (Ky.) 291; *Stevens v. West*, 1 How. (Miss.) 308; *Holliman v. Rogers*, 6 Tex. 91-7; *Odlin v. Greenleaf*, 3 N. H. 270; *Cochran v. Wheeler*, 7 Id. 202; *Blake v. Sewell*, 3 Mass. 556; *Boylston v. Green*, 8 Id. 465; *Hopkins v. Farwell*, 32 N. H. 425; *Batchelder v. Fiske*, 17 Mass. 467; *Lansing v. Gaine*, 2 Johns. 303; Story on Prom. Notes, secs. 180, 381, 384; *Burridge v. Manners*, 3 Comp. 194; *Callow v. Lawrence*, 3 M. & Sel. 97; *Norton v. Coons*, 3 Denio, 130; *Powers v. Nash*, 37 Maine, 322.)

III. The allegation of plaintiff of an assignment to him of the joint note of himself and Henry is the exact equivalent in law of an allegation of payment of the note by plaintiff. (*Gordon v. Wansey*, 21 Cal. 77; *Long v. Bank of C.*, 1 Litt. Ky. 291; *Bryant v. Smith*, 10 Cush. 169).

N. Soderberg, for Respondent.

I. The statement on motion for a new trial should be stricken out and disregarded. (*Corbett v. Swift*, 6 Nev. 194.)

II. The complaint being verified, and defendant having failed to specifically controvert the assignment and indorsement of the note to plaintiff, his ownership thereof, non-payment, and the amount due thereon, the judgment of the court below must be affirmed, whether the statement be considered or not. This is a material allegation. (C. L. sec. 1128; *Frisch v. Caler*, 21 Cal. 71.)

III. The findings, not being embodied in the statement, are no part of the record. (C. L. sec. 1266.)

IV. The doctrine invoked by appellant that the note became extinguished when paid by the surety is unjust, illiberal, technical, and against public policy. There is no more reason for applying such a rule against a surety, than

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against an indorser. (*Rockingham Bank v. Claggett*, 29 N. H. 292; Story on Bills, p. 246; note 2 and cases cited; *Guild v. Eager*, 17 Mass. 615.)

By the Court, LEONARD, J.:

It is alleged in the complaint that defendant made his certain promissory note with plaintiff as surety, in words and figures following, to wit:

“\$450.

“On the first day of February next, for value received, we jointly and severally promise to pay Whitesides & Sacridier the sum of four hundred and fifty dollars in United States gold coin, with interest at two per cent per month, until paid.

CHARLES HENRY,
FRED. FREVERT.

“Genoa, September 28, 1865.”

“That said note was then and there delivered to the payees named therein, who indorsed and transferred the same to one Henry Epstein, by whom it was held and owned when it became due and payable, on the first day of February, 1866; that defendant failed and refused to pay the amount due on said note, or any part thereof, when it became due; that immediately thereafter said Henry Epstein duly notified plaintiff, as surety upon said note, that defendant had failed and refused to pay any part of said note; that both principal and interest remained due and payable from said maker to said indorsee; that he, the said indorsee, should look to plaintiff as such surety to pay the same, and then and there demanded of and from plaintiff the payment thereof; that subsequently, to wit, about March 16, 1866, plaintiff, as such surety, was compelled to, and did, pay to said Epstein, the lawful holder and owner of said note, the sum of one hundred dollars, United States gold coin, which sum, thus paid, was paid for and on behalf of defendant, on account of said note, and in part payment of the principal and interest; that subsequently, to wit, about the — day of May, 1866, plaintiff, as such surety, was compelled to, and did, pay to said Henry Epstein, who was still the

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lawful holder and owner of said note, the further sum of four hundred and fifty dollars and fifty cents, United States gold coin, which said further sum thus paid, was paid for and on behalf of said defendant, and on account of said note, and in full payment of the principal and interest of said note, and thereupon said indorsee duly indorsed, assigned, and delivered said note to plaintiff, who is now, and ever since has been, the lawful holder and owner of the same; that no part has been paid, and there is now due from defendant to plaintiff, on account of said note and said moneys paid as before stated, with interest thereon, the sum of one thousand seven hundred dollars, in United States gold coin."

Other facts are pleaded, showing that the action is not barred by the statute of limitation, and the prayer is for judgment for one thousand seven hundred dollars, besides interest upon the sum of four hundred and fifty dollars, at two per cent. per month, from the commencement of the action until judgment, and costs of suit.

By his answer defendant admitted the making and delivery of the note as alleged, but denied payment by defendant, or that one thousand seven hundred dollars or any other sum was due as alleged or otherwise. He also pleaded entire failure of consideration.

Plaintiff recovered judgment for one thousand eight hundred and one dollars and fifty cents, with interest upon four hundred and fifty dollars at the rate of two per cent. per month from the date thereof until paid, and costs of the action.

Defendant moved for a new trial, which was denied; and this appeal is taken from that order and from the judgment. At the oral argument, counsel for plaintiff made several preliminary motions, one of which was to strike out the statement on motion for a new trial, for reasons then stated. Inasmuch as our opinion will be based upon errors claimed by counsel for appellant to appear upon the judgment roll, which will necessitate a reversal or modification of the judgment, it is unnecessary to pass upon the preliminary motions. In cases of this character a judgment must

accord with, and be warranted by, the pleadings of the party in whose favor it is rendered, and if such is not the case the judgment is as fatally defective as one not sustained by the findings or verdict. (*Bachman v. Sepulveda*, 39 Cal. 638.)

An objection that the judgment is not authorized by the pleadings may be taken upon the judgment roll alone, whether there is a statement on motion for a new trial or not. (*Putnam v. Lamphier*, 36 Cal. 158.)

Upon an appeal from a judgment, any error appearing in the judgment roll may be corrected in the appellate court without a statement on appeal. (*Klein v. Allenbach*, 6 Nev. 162.)

Let us ascertain, then, the full extent of relief to which plaintiff was entitled, according to the case made by his complaint, and for what amount he could have taken a valid judgment, if defendant had failed to appear and answer. And first, what is the nature of this action? Is it an action upon the promissory note proper, or is it to recover, on implied assumpsit, for money paid by plaintiff for defendant's use and benefit, as surety, in satisfaction of the note? I think it is the latter. Plaintiff had no right to bring any other action, and all the facts necessary to support such an one are pleaded. It is true that there are certain immaterial allegations which are proper to be inserted, and are material, in an action upon a promissory note; but those allegations, when considered with previous ones, cannot be true in the sense apparently expressed, whether the action was intended to be upon the promissory note proper, or for money paid for defendant's use and benefit.

That is to say, plaintiff having alleged that he paid five hundred and fifty dollars and fifty cents, for and on behalf of defendant, on account of said note, and in full payment of said note, principal and interest, it is an insertion of mere surplusage to allege, in addition, "that Epstein then indorsed, assigned, and delivered said note to plaintiff; that plaintiff is and ever since then has been the lawful holder and owner thereof, and that no part has been paid."

Plaintiff could not be the "owner and holder," after

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payment, except as evidence of the fact that he has paid the note. If, as joint maker, although in fact only surety, he paid the note to Epstein, it was no longer negotiable. Had he passed it by indorsement to another, his indorsee could not have recovered upon the note, nor could plaintiff recover upon it in his own name. By his payment, as alleged, to Epstein, the note was satisfied and became *functus officio*, as to both plaintiff and defendant. There was, thereafter, no debt due from either to Epstein; but, by reason of plaintiff's payment, defendant became indebted to him for the amount due and paid.

It is said by counsel for plaintiff that "the complaint being verified and the defendant having failed to controvert specifically the assignment and indorsement to the plaintiff, his ownership thereof and non-payment, the judgment must be affirmed whether the statement be considered or not."

It may be admitted, generally, that in an action upon a promissory note, an allegation of non-payment is a material averment, and consequently, in such an action, should be denied if the fact of payment be relied on. But here the allegations are that after payment had been made to Epstein by plaintiff, one of the joint makers, Epstein then assigned and delivered the note to plaintiff, and that defendant has not paid the same to him. Such an allegation, upon the facts disclosed by the complaint, falls of its own weight and requires no denial. Upon the facts stated, that plaintiff paid the note, principal and interest, to Epstein, the law declares that defendant need not pay, and cannot be compelled to pay, the note as such; but that he ought to pay, and can be made to pay, to plaintiff, the amount due and paid by him.

In *Holliman v. Rogers*, 6 Tex. 97, the court says: "It will be recollected that the notes sued on in this case were the joint notes of the defendant Holliman, Grace, and O'Neal. The record does not disclose whether the two last-named were securities of the former or not. But to put it on the footing that Grace put it on himself, in speaking of the payment of the notes, which testimony was ruled out by the court, that he had paid the notes as

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security of Holliman, such payment amounted to an extinguishment of the original liability, and no suit could be maintained on the notes in the name of either Grace or his agent Rogers. Grace would have a right of action against Holliman for the money or the amount paid, but not founded on the notes, because they had been paid off and the debt secured by them extinguished. The right of action would have been founded on an implied assumpsit, to which there could have been no other party plaintiff but the security, Grace, who had paid the money."

It has been held in some cases that when a note has been paid by one who is merely collaterally interested, as an indorser, its negotiability is not destroyed, and the note remains good as against the maker. (*Cochran v. Wheeler*, 7 N. H. 202; *Guild v. Eager*, 17 Mass. 615.) In *Davis v. Stevens*, 10 N. H. 188, the court comments upon those cases thus:

"Where a note is taken up under such circumstances, it is not, in fact, paid. An individual discharges his liability as guarantee merely, but the general promise of the note remains unextinguished. But such is not this case. Here, if payment is made at all, it is made by a co-signer. But where one of two joint promisors, who is liable directly upon the note for its whole amount, pays such note, the note is necessarily extinguished. Whenever he discharges himself from the note by such payment, the payment goes to the whole promise of the note, and when the entire promise of the note is met and extinguished, it cannot afterwards be revived as a subsisting contract against a co-signer. New rights and liabilities arise betwixt the co-signers, but the original contract is at an end." (See, also, *Hopkins v. Farwell & Scott*, 32 N. H. 429; *Long et al. v. Bank of Cynthia*, 1 Little (Ky.) 291; *Bryant v. Smith, executrix*, 10 Cush. 171; *Pray v. Maine*, 7 Id. 253; *Stevens & Pillet v. West & Hamilton*, 1 Howard (Miss.) 310; *Smith v. Johnson*, 23 Cal. 64; 2 Pars. on Notes and Bills, 237.)

Upon the facts stated in the complaint, plaintiff was entitled to maintain an action of implied assumpsit for the amount paid, but he could not sustain an action upon the

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note. We think it appears upon the judgment-roll that the court erred in giving judgment for any sum greater than the amount paid by plaintiff in satisfaction of the note, to wit, five hundred and fifty dollars and fifty cents, together with legal interest thereon from the date of payment until judgment. This conclusion necessarily follows from the allegations contained in the complaint, and the consequent legal conclusions of a total satisfaction of the note and extinguishment of the debt arising therefrom. The law implies a promise on the part of defendant to repay plaintiff, but it does not imply a promise to pay him any interest beyond ten per cent. per annum, the legal rate allowed by the statute in such cases. That provides that parties may agree in writing for the payment of any rate of interest whatever on money due, or to become due, on any contract, and when there is no express contract in writing fixing a different rate of interest, interest shall be allowed at the rate of ten per cent. per annum. If there was any contract or agreement in writing between plaintiff and defendant that plaintiff should receive more than the legal rate of interest, that fact should have been pleaded, and in the absence of such allegation, he was not entitled to receive interest in excess of ten per cent. per annum from the date of payment. The only error complained of, and the only one shown, even though we should examine the statement, is that judgment was rendered for a higher rate of interest than the law allows. Under such circumstances, it is proper that the judgment be modified. The court below is directed to so modify the judgment herein as to allow the plaintiff the sum of five hundred and fifty dollars and fifty cents, together with interest thereon at the rate of ten per cent. per annum from the dates of payment until judgment, and legal interest upon said sum of five hundred and fifty dollars and fifty cents from date of judgment until it is paid, together with costs of suit, all in gold coin of the United States; and as so modified the judgment will stand affirmed. The plaintiff will pay the costs of appeal.

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[No. 978.]

CERESA GEREMIA ET AL., RESPONDENTS, *v.* JAMES MAYBERRY, APPELLANT.**RULE AS TO CONFLICT AND WEIGHT OF EVIDENCE ENFORCED.**

CONTRACT—COLLATERAL EVIDENCE INADMISSIBLE.—When there is a conflict of evidence as to whether plaintiff was to receive one dollar and ninety cents or two dollars per cord for cutting wood: *Held*, that testimony that defendant let contracts to other parties for one dollar and ninety cents per cord was inadmissible.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts are stated in the opinion.

Boardman & Varian, for Appellant:

A. C. Ellis, for Respondent:

By the Court, BEATTY, C. J.:

Plaintiffs in this case sue for a balance claimed to be due on a contract for cutting wood. It is alleged in the complaint that the contract price was two dollars per cord. Defendant admits that the larger part of the wood was cut under a contract for two dollars per cord, but alleges that eleven thousand cords and upwards were cut at an agreed price of one dollar and ninety cents. Upon this issue the jury found for the plaintiffs, allowing two dollars per cord for all the wood cut.

Defendant moved for a new trial upon the grounds, first, that the finding of the jury as to the contract price was contrary to the evidence; and second, that the court had erred in excluding certain evidence offered by the defendant for the purpose of proving his side of the issue.

The motion for a new trial was overruled, and the defendant, on appeal from that order and from the judgment, relies entirely upon the two grounds stated in support of his motion for a new trial.

As to the first ground we can only say that, although the district court might have been justified in setting aside the verdict upon the ground that it was against the preponder-

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ance of the evidence, there is no such decided preponderance against it as to authorize this court to interfere. The finding in question is fully supported by the testimony of one of the plaintiffs. He is flatly contradicted by the defendant and the agent of the latter. The apparent weight of the testimony, as presented by the statement of the case, is certainly against the verdict; but this is the most that can be said of it, and it is settled by a long line of decision in this court that we cannot reverse the finding of a jury on the ground that it is against evidence, unless the preponderance against it is so great as to satisfy us that there was either an absolute mistake on the part of the jury, or that they acted under the influence of prejudice, passion or corruption. (See 4 Nev. 156, 304, 395; 5 Id. 415, 281; 6 Id. 203, 215; 9 Id. 67; 11 Id. 96.)

The mere fact that the defendant was corroborated by his agent in his contradiction of plaintiffs' testimony is not sufficient to satisfy us that the finding of the jury was the result of mistake, passion, prejudice or corruption.

As to the second point, the alleged error of the court consisted in the rejection of defendant's offer to prove that he had made a number of contracts with third parties for cutting wood from the same tract from which plaintiffs cut the eleven thousand and odd cords in dispute, and that the highest price paid to such third parties was a dollar and ninety cents per cord.

We do not think the court erred in excluding this testimony. Its only tendency was to prove that others were willing to cut wood at that rate; it had no tendency to prove that these plaintiffs had agreed to do so. It is argued with some plausibility that if others were willing to cut wood at a dollar and ninety cents on section 14, that fact renders it improbable that defendant would have agreed to pay plaintiffs two dollars for cutting wood on the same section, and hence that the evidence ought to have been admitted for the purpose of sustaining the direct testimony of defendant and his witnesses and of enabling the jury to determine as to its credibility.

It is easy to conceive of a case in which evidence of this

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character would have great weight and in which it might materially assist in arriving at a correct solution of the matter in dispute. But the rule of evidence is against the admission of proof of collateral facts for the purpose indicated (1 Gr. Ev., sec. 52), and it has been applied in cases in which it might have been relaxed with greater propriety and safety than in cases like this.

In *Hollingham v. Head*, 4 Com. B. N. S. 388, the defendant was sued for the price of a quantity of artificial manure. His defense was that he was not to pay for it unless it proved to be equal to Peruvian guano. It was shown that the manure was worthless; and, for the purpose of corroborating his testimony as to the terms of the contract, the defendant offered to prove that the plaintiff had made sales to other persons, agreeing that he was not to be paid unless the manure proved to be equal to Peruvian guano. That case was stronger than this, for the reason that the offer there was to prove what the plaintiff had consented to, while in this case the offer was to prove what had been done by third parties. The court, however, excluded the testimony and upheld the rule upon the ground that the admission of such speculative evidence would be fraught with great danger; in other words, that it would do more harm than good in the long run.

There is a special reason why counsel for appellant contends that he should have the advantage of a different rule in this case. One of the plaintiffs' witnesses testified that he had a contract for cutting on section 14 for two dollars a cord, and it is argued that defendant was entitled to introduce evidence of the same character. It is a sufficient answer to this to say that the testimony referred to was not drawn out by the plaintiff, but by the defendant on cross-examination.

We find no error in the judgment or order appealed from, and they are therefore affirmed.

Argument for Relators.

14	202
16	378

[No. 975.]

THE STATE OF NEVADA EX REL. KEYSER & ELROD,
RELATORS, v. J. F. HALLOCK, STATE CONTROL-
LER, RESPONDENT.

ACT TO ESTABLISH STATE ASYLUM UNCONSTITUTIONAL.—The act entitled “An act to establish and maintain a state asylum for the indigent poor and maimed of this state” (stat. 1879, 142), is in plain conflict with section 3, art. 13, of the constitution.

IDEM—REPEAL OF STATUTES.—When the provisions of an unconstitutional act attempt to repeal a former statute: *Held*, that the repealing clause falls with the act.

APPLICATION for mandamus.

The facts appear in the opinion.

R. H. Taylor and *H. R. Whitehill*, for Relators.

I. The act approved March 17, 1879, is constitutional. (Secs. 1, 3, Art. XIII; Sec. 2, Art. XVII., of Con.; *Devlin v. Coleman*, 50 N. Y. 531; *Exline v. Smith*, 5 Cal. 112.)

II. The constitution must be so construed as to give effect to all of its provisions. (*State v. Scott*, 9 Ark. (4 Eng.) 277, 282; *State v. Dayton T. R. Co.*, 10 Nev. 160.)

III. The contemplated asylum is an institution required by the public good. The legislative dictum upon that subject shuts out all debate. The court must look to the words of the instrument, and say *ita lex scripta est.*) *People v. Morrell*, 21 Wend. 534; *State v. Scott*, 9 Ark. 276; 1 Story on Constitution, sec. 425; *Holman Heirs v. B. of Norfolk*, 12 Ala., E. S. 418; *Maize v. State*, 4 Ind. 344; *Com. v. McWilliams*, 11 Penn. St. (1 J.) 70; *Bourland v. Hildreth*, 26 Cal. 180; *Stock. & V. R. R. Co. v. Stockton*, 41 Id. 158.)

IV. All presumptions are in favor of the validity of legislative enactments. (*State v. Brennan's Liquors*, 25 Conn. 288; *Hartford Br. Co. v. Union Ferry Co.*, 29 Id. 227; *Maize v. State*, 4 Ind. 344; *Brown v. Buzan*, 24 Id. 196; *Groesch v. State*, 42 Id. 547; *Lucas v. Commissioners Tip. Co.*, 44 Id. 530; *Taylor v. Flint*, 35 Ga. 124; *Armstrong v. Jones*, 34 Id. 309; *Adam v. Howe*, 14 Mass. 340; *Ex parte McCollom*, 1 Cowen, 564; *Clark v. People*, 26 Wend. 605; *Newell v. People*, 7

Argument for Respondent.

N. Y. 109; *Lane v. Dorman*, 3 Scam. 240; *Emerick v. Harris*, 1 Binn. 416; *Com. v. Smith*, 4 Id. 123; *Com. v. McWilliams*, 11 Penn. St. 70; *Farmer and Mec. Bank v. Smith*, 3 Serg. & R. 73; *Fletcher v. Peck*, 6 Cranch 128; *Gibbons v. Ogden*, 9 Wheat. 187; *Hobart v. Sup. Butte Co.*, 17 Cal. 30; *Stock. & Vis. R. R. Co. v. Stockton*, 41 Id. 159; *Ash v. Parkinson*, 5 Nev. 35.)

V. When an act of the legislature is assailed as unconstitutional, the objector assumes the burden of showing either that it is an exercise of authority not legislative in its nature, or that it is inconsistent with some provision of the federal or state constitution. (*Dorman v. State*, 34 Ala. N. S. 231; *Hobart v. Supervisors*, 17 Cal. 30; *Cohen v. Wright*, 22 Id. 303; *Bourland v. Hildreth*, 26 Id. 183.)

The following authorities are also referred to as bearing upon the different points made for relators. (*Roosevelt v. Goddard*, 52 Barb. 533; *People v. Bennett*, 54 Barb. 480; *McComber v. New York*, 17 Abb. Pr. 35; *Settle v. Van Evrea*, 49 N. Y. 280; *Buckingham v. Davis*, 9 Md. 328; *Manly v. State*, 7 Md. 147; *Ex parte McCollom*, 1 Cowen, 564; *Kendall v. Kingston*, 5 Mass. 532; *Tyler v. People*, 8 Mich. 320; *Tabor v. Cook*, 15 Id. 322.)

M. A. Murphy, Attorney General, for Respondent:

I. It was the intention of the constitution that the law should be so framed that the unfortunates should be provided for within the counties where they resided, in order to meet the requirements of that class of unfortunates mentioned in sec. 3 of art. XIII. of our constitution. (Sec. 3749 *et seq.* C. L. Nev., vol. 2.)

II. The words *shall provide*, used in sec. 3 of art. XIII., are mandatory. (Sedgwick on C. & S., 317, note Cons. Pro.; Id. 375, "may and shall.")

III. The act is unconstitutional, because it is in conflict with section 8 of the declaration of rights. (Cooley on Cons. Lim. 339; *In the matter of Janes*, 30 How. Pr. Rep. 446; 65 Me. 120.)

IV. The county commissioners are the creatures of the statutes, and are possessed of no power to deprive a person

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of his liberty; neither can the legislature confer upon a county physician and chairman of the board of county commissioners judicial powers to deprive a person of his liberty without due process of law. (65 Maine, 120.)

V. If there is a doubt in the minds of the judges, the written constitution should have the benefit of the doubt. (Cooley on Cons. Lim. 73; *People v. Lynch*, 51 Cal. 25.)

VI. As to conflict between different sections, the whole instrument to be examined. (Cooley's Cons. Lim. 57-59.)

VII. Section 3 of article XIII. in express terms makes it obligatory upon the counties to support the class therein named within the territorial limits of each county. The presumption is that the people designed that it should be exercised in that mode only. (Cooley's Cons. Lim. 78.)

By the Court, BEATTY, C. J.:

This is a petition for a writ of mandamus to compel the respondent, who is state controller, to draw his warrant in favor of the petitioners for the amount of a duly allowed claim on the fund created by an act of the last legislature, approved March 17, 1879, and entitled "an act to establish and maintain a state asylum for the indigent poor and maimed of this State."

The case has been submitted upon demurrer to the petition and upon a stipulation as to the facts which present but one question for decision, and that is as to the constitutionality of the act referred to. If the act is held valid the writ is to issue, if not the proceeding is to be dismissed.

Respondent does not question the correctness of petitioners' proposition that "when an act of the legislature is assailed as unconstitutional the objector assumes the burden of showing either that it is an exercise of authority not legislative in its nature, or that it is inconsistent with some provision of the federal or state constitutions." He admits also that all presumptions are in favor of legislative enactments, and that the act in question must stand unless, as he undertakes to show, it is in plain and palpable conflict with section 3 of article

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XIII. of the state constitution, which reads as follows: "Section 3. The respective counties of the state shall provide, as may be prescribed by law, for those inhabitants who by reason of age and infirmity or misfortunes may have claim upon the sympathy and aid of society."

The nature of the act under which petitioners claim is very clearly indicated by its title. It creates a state asylum for paupers, and repeals the law under which hitherto the respective counties of the state have been compelled to relieve their own poor. The trustees of the state asylum are required to receive and support any person who is certified by the chairman of the board of county commissioners and the county physician to be a *bona fide* resident of their county, and from the infirmities of age or other sufficient cause, unable to support himself, and without the means of support. (Sec. 7.) This is the substance of the act, and its scope and operation are manifest. It deprives respective counties of the means of providing for their own poor, and transfers all the paupers in the state to one establishment, where they are to be maintained at the charge of the whole people. The repugnance of such provisions to the policy declared in the section of the constitution above quoted is too obvious to require comment, for the meaning of that section, whether read by itself or in connection with other sections which are supposed by counsel for petitioners to control or modify it, is perfectly clear. "Those inhabitants who, by reason of age, etc., may have claim upon the sympathy and aid of society" is merely an euphemism for "paupers," and to "provide for" paupers is to feed and clothe and house them. This is what the people in framing our constitution have said that the respective counties shall do, and this is exactly what the legislature has undertaken to say the state shall and the counties shall not do. This being so, there can be no doubt that the act is void. It is true that the constitution does not expressly inhibit the power which the legislature has assumed to exercise, but an express inhibition is not necessary. The affirmation of a distinct

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policy upon any specific point in a state constitution implies the negation of any power in the legislature to establish a different policy. "Every positive direction contains an implication against anything contrary to it which would frustrate or disappoint the purpose of that provision. The frame of the government, the grant of legislative power itself, the organization of the executive authority, the erection of the principal courts of justice, create implied limitations upon the law-making authority as strong as though a negative was expressed in each instance." (*People v. Draper*, 15 N. Y. 544.) The presumption is always that the positive provisions of a constitution are mandatory and not merely directory (*Cooley's Con. Lim.* 78, 79), and there is nothing to overthrow this presumption with respect to the provisions under discussion. On the contrary it is strongly supported by the consideration that section 3 of article 13 of our constitution simply engrafts upon our fundamental law a policy with respect to pauperism which has prevailed in England and this country for more than three centuries—the policy of local relief for local necessities. With the wisdom of this traditional policy we have nothing to do, and we only refer to its long prevalence as a proof, if proof were needed, that the framers of our constitution knew what they were about in adopting the section in question and meant what they have said.

But counsel for petitioner contend that section 1 of Article 13, controls or modifies the construction and operation of section 3. Section 1 reads as follows: "Institutions for the insane, blind, and deaf and dumb, and such other benevolent institutions as the public good may require, shall be fostered and supported by the state, subject to such regulations as may be prescribed by law."

The substance of the argument on this point, if we have correctly apprehended it, is as follows: The passage of the act in question is equivalent to a solemn declaration by the legislature that a state asylum for the poor of the state is a benevolent institution which the public good requires; such declaration by the legislature is conclusive upon the

courts, therefore this is an institution which the state is enjoined by section 1 to foster and support, and consequently section 3 must receive some construction which will not defeat the legitimate operation of section 1, to which this act simply gives effect.

It is a mistake, however, to assume that the judgment of the legislature, no matter how deliberately or solemnly expressed, that a state asylum for the poor is an institution required by the public good, is conclusive upon any one, if it is true that the people have declared in the constitution that the public good requires paupers to be supported by their respective counties. And since it is clear that such a declaration has been incorporated into the fundamental law, the whole argument, based upon the conclusiveness of the legislative declaration, falls to the ground. In this view the two sections have a perfectly harmonious operation. The state is enjoined by section 1 to foster and support institutions for the public good. By section 3 it is declared that the public good requires paupers to be supported by their respective counties; the case of paupers is specifically excepted from the rule in relation to other classes of unfortunates.

There is also another view in which the two sections may be perfectly reconciled. Institutions for the insane, deaf and dumb, and blind are required by the public good in a sense wholly different from any in which asylums for paupers can be said to be for the public good. Society looks to no ulterior or contingent advantage from the support of the poor. They are supported for their own good exclusively, and simply because humanity impels us to relieve their necessities. It is different with respect to the insane, the deaf and dumb, and blind. If an insane man is restored to his reason by treatment in an asylum, there is a positive gain to the community; if he is incurable, there is a negative advantage to the public in keeping him under restraint, and so preventing him from doing mischief. The blind and deaf and dumb may be educated and trained in institutions specially adapted for the purpose into useful and

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self-supporting citizens—a double advantage to the community, in making them contributors to the general good, instead of leaving them as a burden on others. Institutions founded with these objects are, therefore, in an emphatic sense, for the public good, as contradistinguished from the good of mere objects of charity. The state orphans' home is an instance of this sort of institution. The object in that case is not merely to clothe and feed the orphan children—the wards of the state—but to rescue them from the dangers of neglect, to educate them and make them useful members of society, instead of exposing them to the dangers of falling into the class of depredators and malefactors.

It thus appears that there are two distinct views in which sections 1 and 3 of article 13 are perfectly harmonious; but there is no possible interpretation of the latter which will harmonize with this act.

There is still another argument of counsel to be noticed. They say the legislature undoubtedly had the power to repeal the “act relating to the support of the poor,” approved November 29, 1861 (C. L., secs. 3749 to 3759), and they have done so (sec. 11 of this act). It is the same, therefore, as if there never had been any act prescribing the mode by which the respective counties should provide for their poor, and they ask: “If the act of 1861 had never existed, would not the legislature have had a right under section 1 of article 13 to pass the law of 1879?” We answer unhesitating that they could not. It would be a strange doctrine that the legislature, by neglecting to do what the constitution positively enjoins, could thereby gain the right to do what it impliedly forbids.

We wish to add in this connection that in our opinion the act of 1861 is not repealed. The power of the legislature to repeal a law enacted for the purpose of carrying into effect a provision of the constitution, without at the same time passing some other law to make it effective, is a question that need not be discussed. It is sufficient for the purposes of this case to say that it cannot be presumed the legislature would have repealed the law of 1861 without

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they had thought this act to be a sufficient substitute therefor; and since we are constrained to hold the principal provisions of this act unconstitutional, it follows that the repealing clauses must fall with the rest. (Cooley, Con. Lim. 178.)

The petition for mandamus is dismissed.

[No. 932.]

THE STATE OF NEVADA, APPELLANT, v. D. H. HASKELL ET AL., RESPONDENTS.

QUO WARRANTO—TOLL ROAD FRANCHISE—ABANDONMENT—BURDEN OF PROOF.—When the pleadings admit that the parties owning a toll-road franchise have a good title, and the proceeding to have the franchise forfeited is based solely upon a claim of abandonment or forfeiture, the affirmative of the issue and the burden of proof is on the State.

APPEAL from the District Court of the Eighth Judicial District, Esmeralda county.

The facts appear in the opinion.

M. A. Murphy and Wells & Stewart, for Appellant.

When an information in the nature of *quo warranto* is filed against a party, the *onus* of proof is upon him, not upon the informant. (Angel & Ames on Corp., 734, 749, 751, 756; 15 Johnson, 358.)

Robert M. Clarke and N. Soederberg, for Respondent.

The judgment of the lower court is right. The burden of proof was upon the state to establish the forfeiture alleged in the complaint, not upon defendants to prove a negative. (C. L. Nev. 392-394; *State v. Brown*, 34 Miss. 688; 2 Doug. Mich. 359; High's Ex. L. Rem. 720, 725.)

By the Court, BEATTY, C. J.:

This is a proceeding by information in the nature of a *quo warranto* instituted by the district attorney of Es-

 Points decided.

meralda county for the purpose of having a toll-road franchise declared forfeited.

The complaint alleges the grant of the franchise in 1862 and its acceptance and enjoyment until 1869, at which time it is charged the defendants abandoned the road and ceased for a period of eight or nine years to keep it in repair. The answer denies the alleged abandonment, and denies that there was any neglect to repair sufficient to work a forfeiture.

When the case was called for trial the district attorney declined to offer any testimony, and judgment was thereupon entered in favor of the defendants. From the judgment so entered the state appeals. Only one question is involved in the case, and that is as to the burden of proof under the pleadings.

The general rule in cases of this character is that the person claiming the franchise must plead and prove a good title thereto, and that the state is bound to prove nothing; but when, as in this case, it is admitted that the defendant has had a good title, and the only ground of the proceeding is a claim of abandonment or forfeiture, the affirmative of the issue and the burden of proof is on the state.

Proceedings upon *quo warranto* and information in the nature thereof are regulated by statute in this state (C. L., secs. 389 to 415), and it is therein provided (sec. 394) that the issues are to be tried as in other civil cases. This being so, it follows that the state, like any other party relying on a forfeiture or an abandonment, must prove its case.

The judgment of the district court is affirmed.

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16 37

 [No. 967.]

THE STATE OF NEVADA, RESPONDENT, v. ROBERT
FRAZER, APPELLANT.

CRIMINAL LAW—HOMICIDE—JUSTIFICATION.—Where there is any testimony to support the plea of justifiable homicide, the court has no right to withdraw that question from the jury. A refusal to instruct the jury thereon: *Held*, erroneous.

IDEM—REMARKS OF COURT.—The court, before charging the jury, said to prisoner's counsel: "That the theory of the defense was based upon the

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proposition that the defendant, at the time, was laboring under an aberration of mind, and therefore not responsible; that this was clearly disproven by the statement of the defendant himself," etc.: *Held*, improper.

APPEAL, from the District Court of the Sixth Judicial District, Lincoln County.

The facts are stated in the opinion.

F. M. Huffaker, for Appellant.

I. The instructions given by the court were erroneous. (*State v. Duffy*, 6 Nev. 139.)

II. The oral remarks of the court in the presence of the jury were improper. They amounted to an instruction upon the facts, and were in violation of sec. 12, art. 6 of the state constitution. (*People v. Bonds*, 1 Nev. 35; *State v. Harkin*, 7 Nev. 381; *People v. Ah Fong*, 12 Cal. 347.)

A. B. & W. J. O'Dougherty, and *Stone & Hiles*, also for Appellant.

M. A. Murphy, Attorney-General, for Respondent.

By the Court, LEONARD, J.:

Appellant was indicted for the crime of murder, and convicted of manslaughter. He was sworn as a witness in his own behalf, and testified as follows:

"On the day of the trial with the Floral Springs Water Company, Mr. Donahue (the deceased) gave in false testimony against my wife, and slandered her in court. After going home she took it very bad to heart, and seemed to be very sick. I told her 'not to mind that; the first time I saw Donahue that I would speak to him.' Having occasion to go down town, she asked how long it would be before I would be back. I told her perhaps twenty minutes or a half hour. * * * I went down town. I saw Mr. Newton sitting on a dry goods box in front of Alexander's. I sat down beside him. We got into conversation. * * * I looked up and saw Mr. Donahue coming down the west side of Main street. I walked across the street, and just

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as Donahue got to the south door of Schusterich's saloon, I told him I would like to speak to him. Instead of his coming direct to me he kept on the sidewalk, shoved his hand into his pocket and came around the horses' heads of the team that was standing there in front of Matt. Schusterich's saloon. Says he: 'What do you want?' I asked him 'if he thought it was right to swear false in the court-house and slander a woman;' and I think I said 'making her a laughing-stock through the town.' Says he: 'Do you believe it?' Says I: 'You take time till I tell you the tale out.' Says he: 'Do you believe it?' I said that 'I knew it.' And with the implement that he had in his hand he struck me at that very instant. I could not see, but the head of it seemed to me to be a chisel, or some implement of the kind. I could not positively swear to the shape of it, or whether it was steel or iron; but the very instant he struck at me he said I was a — liar. Whether there was anything more said I could not tell, for I thought I had got my death blow right there. I staggered back some eight or ten feet. * * * Think I was down on one knee; would not be positive as to being down on both. The blood was streaming over my face, and as I raised to my feet I saw Donahue in the attitude, as I thought, of coming towards me again. I then drew the pistol, and as I fetched the pistol down he turned with his right side towards me just as I fired at him. At this instant he threw his right hand to his right hip, and the team started off. * * * The next I saw of him I think was on Lacour street, and I fired again. They say I fired four shots, but I could not remember. The reason I could not remember, I presume, was owing to the excitement and the blow together. I followed the man; could not tell how far, and I stopped. Seemed to be a good many men to rustle around me. They asked me if I was shot. I told them I did not think I was shot. I thought that my skull was driven in."

Dr. Lee testified that appellant was wounded over the left eye, the wound having been nearly an inch in length. The skin and flesh were cut through to the bone. The skull was

slightly fractured. The fracture was nearly the length of the flesh wound. There was quite an effusion of blood. The effects of the blow and wound were considerable physical prostration and nervous excitement.

It seems from the testimony that four shots were fired; but it was claimed by counsel for appellant that death was caused by the first, and there was testimony tending to show that such was the fact.

There was considerable testimony to the effect that the blow staggered appellant, and that blood flowed profusely from the wound. Witness Hannon testified that Donahue was in a fighting attitude after he had struck appellant, holding his right hand, as stated by the witness, on his right pistol pocket.

With the above testimony before the court and jury, in connection with the plea of "not guilty," it was plainly the duty of the court to submit to the jury, under proper instructions, the question of justification. This the court refused to do, but instructed them as follows: "The defendant, by his own testimony, confesses his guilt under the law. All that you have to do is to determine whether that guilt, under all the facts as testified to, amounts to either murder in the first degree, murder in the second degree, or manslaughter. You have nothing to do with the question as to whether he is innocent or guilty, for you are hereby charged that he has confessed his guilt in one or the other degrees of murder or manslaughter. The only question left open to you is to determine whether the defendant is guilty of manslaughter, or of murder in the second or first degree."

There was some testimony, at least, to support appellants' claim of justifiable homicide, and the withdrawing of that question from the jury and the refusal to instruct them thereon were errors.

It was error also to refuse instructions upon reasonable doubt and the legal presumption of innocence until proof of guilt.

Immediately before charging the jury, addressing itself to defendant's counsel in explanation of its reasons for re-

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fusing to give certain instructions asked, the court stated orally in the presence of the jury, "That the theory of the defense was based upon the proposition that the defendant, at the time, was laboring under an aberration of mind, and therefore not responsible; that this was clearly disproven by the statement of the defendant himself; that the statement of the defendant showed that he had as clear a recollection of everything that transpired as any other person present; that he had stated distinctly the position of himself and deceased at the time of the firing of the first shot; he had recollection of the deceased passing around the team; crowded deceased against the hydrant, and that he showed a clear recollection of every transaction that transpired up to the fourth shot."

Counsel for the defendant then stated to the court that "the defendant did not claim that he was at all unconscious, or did not have his full faculties throughout the transaction." And the court replied that "if the defendant made no such claim, defendant's own testimony, under the law, amounted to manslaughter, at least, and that he would so instruct the jury."

We had occasion recently to remark upon the impropriety of such or any comments by the trial court in a criminal case (*State v. Tickle*). That the court's first remarks were improper there can be no doubt. They were not called for, and were in effect an oral charge to the jury. Their tendency was, also, to convey to the minds of the jury the idea that appellant's only defense was that he was unconscious at the time of the fatal shot, which, as we have seen, was not the case. To what extent the remarks of appellant's counsel in reply removed the effect of the court's error we shall not stop to inquire, because there was error, and presumably injury, at least. The last remarks of the court to appellant's counsel have nothing to relieve them of their natural effect. They were oral; they withdrew from the jury's consideration appellant's claim of justification, and substituted the court's conclusions in place of the jury's, under proper instructions.

Opinion of the Court—Hawley, J.

The case was tried upon a false theory from beginning to end, and the result is that a new trial must be had.

The judgment and order overruling appellant's motion for a new trial are reversed, and the cause remanded. Remittitur forthwith.

[No. 921.]

MILES QUILLEN, RESPONDENT, v. PATRICK QUIGLEY ET AL., APPELLANTS.

LIABILITY OF SURETIES—WHEN NOT RELEASED.—The sureties upon an undertaking on appeal are not released by the mere delay of plaintiff in bringing suit. The agreement with the principal to delay the commencement of suit must amount to an estoppel upon the creditor sufficient, in law, to prevent him from beginning a suit before the expiration of the extended time.

IDEM—NOTICE BY SURETY.—Sureties can not release themselves from liability by simply giving notice to the creditor to enforce his demand against the principal debtor.

APPEAL from the District Court of the Seventh Judicial District, Lincoln County.

The facts appear in the opinion.

A. B. & W. J. O'Dougherty, for Appellants.

A. C. Ellis, for Respondent.

By the Court, **HAWLEY, J.:**

The record in this case, like that in *Irwin v. Samson*, 10 Nev. 282, "contains an abstract of the minutes reciting, in detail, the orders of the court and proceedings during the trial * * * in the apparent order of the trial and proceedings, instead of a statement on appeal." Respondent, upon this ground, moves for an affirmance of the judgment.

In our opinion the judgment roll presents all the points relied upon by appellants.

They contend that the court erred in rendering judgment "on the pleadings," because their answer raised sufficient

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issuable facts, if proved, to entitle them to a judgment for costs.

The judgment recites the fact that it is rendered, on motion of plaintiff's attorneys, "upon the pleadings in the case."

We regret that the case has not been argued upon its merits.

This suit was brought against Patrick Quigley, the principal, and John C. Lynch and Frank Gindeof, sureties, upon an undertaking, on appeal in the case of *Quillen v. Quigley*, tried in the justice's court. The plaintiff in that suit obtained judgment in the district court. The answer of the sureties alleges: "That before the commencement of this action, to wit, on or about the month of May, 1876, Miles Quillen, the plaintiff herein, made a special agreement with the defendant and judgment debtor, P. Quigley, by which the said Miles Quillen agreed to satisfy the judgment mentioned and set forth in plaintiff's complaint by receiving from the said P. Quigley the amount of said judgment in monthly installments of \$50 per month until the whole of said judgment should be satisfied; that the said P. Quigley, under and by virtue of said agreement, and in ratification thereof, paid to said plaintiff two installments of \$50 each on the amount of said judgment; that the resources of the said P. Quigley, the said judgment debtor, have not been exhausted; that it has been through the fault and negligence of said plaintiff that the amount of said judgment has not been paid; that these defendants, through their attorneys, have frequently requested the said Miles Quillen, the said plaintiff, to enforce said judgment by levying on the available property of the said P. Quigley, but the said Miles Quillen neglected and refused so to do; that in consequence of the said negligence and default of the said plaintiff in not enforcing said judgment, * * * and in consequence of his having entered into said agreement with the judgment debtor, * * * these defendants hold themselves released from all liability under said bond, as set forth in plaintiff's complaint."

This answer presents two questions: First—Would the

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sureties be released by the agreement for an extension of time? Second—Would they be released by reason of their request to have the plaintiff enforce his judgment against Quigley?

I. The law is well settled that if the plaintiff, in such a case, has done any act, or made any agreement, for a valuable consideration, without the consent of the sureties, express or implied, which tends to their injury, or which absolutely suspends or delays the right to coerce the payment of the amount due on the appeal bond, to the prejudice of the sureties, or which puts the sureties in a worse situation, or increases their risks, or impairs their rights, they are entitled to be released.

It is equally as well settled that mere delay, without fraud, is not sufficient. The agreement must amount to an estoppel upon the creditor sufficient, in law, to prevent him from beginning a suit before the expiration of the extended time. Although the creditor stipulates and agrees with the principal debtor, without the consent of the sureties, for delay, so long as the agreement is merely voluntary and not founded on a valuable consideration the surety is not released. (*Newell & Pierce v. Hamer*, 4 How. (Miss.) 684; *Coman v. The State*, 4 Blackf. 241; *Bailey v. Adams*, 10 N. H. 162; *Williams v. Covillaud*, 10 Cal. 419; *Farmers' Bank v. Reynolds*, 13 Ohio, 84; *Brinagar's Adm. v. Phillips*, 1 B. Monroe, 283; *Davis v. Graham*, 29 Iowa, 514; *Obern-doff, Trustee, v. Union Bank of Baltimore*, 31 Md. 126; *Hayes v. Wells*, 34 Md. 512.) The agreement set out in the answer belongs to the class last named.

The mere payment of a part of the amount of the judgment in monthly installments is not a binding legal consideration for the extension of time. There is no legal obligation varying the contract which previously existed between the creditor and the principal debtor. The sureties were not deprived of the right of subrogation. The proposed extension of time did not deprive the sureties of any right which existed at the time of the rendition of the judgment.

In *Seawell v. Cohn*, 2 Nev. 308, which was an action against the sureties on an undertaking given for the release

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of an attachment, there was a stipulation in the original action that execution on the judgment should be stayed for sixty days; provided the defendant would, within thirty days, "pay to plaintiff the one-half of the amount of said judgment." The court held that this did not release the sureties.

In *Ammons v. Whitehead*, 31 Miss. 99, where the sureties had, as in this case, signed an undertaking on appeal from a justice's court, it was decided that the sureties were not released "by a compromise between the principal and the creditor, made without their assent, by which the creditor recovers judgment against the principal and the sureties, with stay of execution for twelve months."

II. In *Pain v. Packard*, 13 Johns. 174, the Supreme Court of New York, departing from the rule of the common law, decided that when the holder of any security is requested by the surety to proceed without delay and collect the money from the principal, and he neglects to do so, the sureties will be exonerated. This rule, for a time, met with considerable opposition. Cowen J., in *Herrick v. Borst*, 4 Hill, 656, in alluding to the principles decided in *Pain v. Packard*, said: "What principle such a defense should ever have found to stand upon in any court, it is difficult to see. It introduces a new term into the creditor's contract. It came into this court without precedent (*Pain v. Packard*, 13 Johns. 174), was afterwards repudiated, even by the court of chancery (*King v. Baldwin*, 2 Johns. Ch. Rep. 554), as it always has been, both at law and equity, in England; but was restored on a tie in the court of errors, turned by the casting vote of a layman (*King v. Baldwin*, 17 Johns. 384), Platt, J., and Yates, J., took that occasion to acknowledge they had erred in *Pain v. Packard*, as senator Van Vechten showed most conclusively that the whole court had done." But the doctrine of *Pain v. Packard* was afterward adopted by the court of appeals, and is now the settled law of that State. (*Remsen v. Beekman*, 25 N. Y. 555.)

The same rule prevails in some of the other states.

In several of the states laws have been passed regulating

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this subject so as to bring the sureties within the rule of *Pain v. Packard*; but nearly all the decisions in these states declare that the rule did not exist as a part of the common law, and decide that the rule can only be enforced by virtue of the statute (*Carr v. Howard*, 8 Blackf. 190; *Halstead v. Brown*, 17 Ind. 202; *People v. White*, 11 Ills. 348; *Taylor v. Beck*, 13 Id. 376; *Villars v. Palmer*, 67 Id. 204; *Jenkins v. Clarkson*, 7 Ohio, 72; *Freligh v. Ames*, 31 Mo. 253); and then only when the notice is clear, positive, and unconditional to proceed forthwith. A mere request to proceed to collect the debt, or to enforce the judgment—as is alleged in the answer in this case—is not sufficient. (*Baker and Brim, Admr's, v. Kellogg et al.*, 29 Ohio St. 663; *Conrad v. Foy*, 68 Penn. St. 385.)

An examination of the numerous authorities upon this subject will show that in a majority of the states, where the question is not regulated by statute, the courts have held that the surety cannot release himself from liability by simply giving notice to the creditor to enforce his demand against the principal debtor. (*Susser v. Young*, 6 Gill. & J. 243; *Croughton v. Duval*, 3 Call. 61; *Dennis v. Rider*, 2 McLean, 451; *Page v. Webster*, 15 Me. 249, *Leavitt v. Savage*, 16 Me. 72; *Eaton v. Waite*, 66 Me. 221; *Frye v. Barker*, 4 Pick. 382; *Mahurin v. Pearson*, 8 N. H. 539; *Baker v. Marshall*, 16 Vt. 522; *Hickok v. Farmers and Mechanics' Bank*, 35 Vt. 476; *Pintard v. Davis*, 21 N. J. L. 632; *Buckalew v. Smith*, 44 Ala. 638.)

This rule, it seems to us, is sustained upon sound reason. The undertaking of appellants, as sureties, is positive in its terms that Quigley should pay, or cause to be paid, "the amount of any judgment and all costs" that might be rendered against him in the district court. Quillen had a direct remedy against the principal and the sureties. The bond was forfeited as soon as the judgment was rendered, and the defendant Quigley made default in its payment.

The plaintiff had not entered into any contract with the sureties on the appeal bond that he would take prompt measures to collect the judgment. The duty of such action rested with them. The law gave them ample protection.

Points decided.

They could have paid the judgment at any time, which would have been no more than they had agreed to do, and could thereupon have sued the principal in their own names and proceeded to collect the amount of the judgment without any delay.

We are of opinion that the court did not err in rendering judgment in favor of plaintiff "upon the pleadings in the case."

The judgment of the district court is affirmed.

[No. 929.]

THE STATE OF NEVADA, APPELLANT, v. THE YELLOW JACKET SILVER MINING COMPANY,
RESPONDENT.

TAXES—STATUTE OF LIMITATION—REVENUE LAWS.—The revenue laws of this state do not except taxes from the operation of the statute of limitations or extend the time for bringing suits for their collection beyond the period allowed by that statute.

IDEM.—The statute of limitation applies to suits brought by the state for the collection of delinquent taxes.

IDEM—CIVIL PRACTICE ACT—DEMURRER.—The defendant in a suit brought for the collection of delinquent taxes has a right to interpose a demurrer to the complaint upon any of the grounds set forth as a cause of demurrer in the civil practice act.

IDEM.—The provisions of the civil practice act, not inconsistent with the revenue laws, are applicable to suits brought for the collection of taxes.

IDEM—MISJOINDER OF CAUSES OF ACTION.—Taxes due the state on the proceeds of mines for the different quarters of each year, cannot be united in the same cause of action. Every quarterly or yearly tax constitutes a separate and independent liability. (Beatty, C. J., dissenting.)

IDEM—DEBTS—IMPLIED CONTRACTS.—Taxes are not debts in the sense that they are obligations or liabilities arising out of contracts express or implied. They are the enforced proportional contribution of each citizen and of his estate, levied by the authority of the state for the support of the government. They owe their existence to the action of the legislature, and do not depend for their validity or enforcement upon the individual assent of the taxpayer, but operate *in invitum*. (Beatty, C. J., dissenting.)

APPEAL from the District Court of the First Judicial District, Storey county.

The facts appear in the opinion.

Robert M. Clarke, for Appellant.

I. The action is properly brought in the name of the state. (2 C. L. Nev. 3261, 3231, 3232; *State ex rel. Drake v. Hobart*, 12 Nev. 408, 411; *State v. Yellow J. S. M. Co.*, 5 Nev. 416.)

II. The complaint does not improperly unite several and distinct causes of action. The several demands stated in the complaint constitute but one cause of action, and may be united in one complaint. The civil practice act is not applicable to tax suits (2 C. L. 3160; 1 Id. 1667); or if applicable, it is only in a qualified sense. (2 Id. 3160.) The revenue laws prescribe the form of complaint and define which may be pleaded. (2 Id. 3156; *State v. C. P. R. R. Co.*, 10 Nev. 47, 61.) No defense can be raised by demurrer which is not allowed by sec. 32, Rev. Laws. (10 Nev. 61.) A tax is not one of the demands mentioned or contemplated by the civil practice act, sec. 64. (C. L. 1127; 1 Van Sant. Pl. 199, 200, 679, 680, 682; *People v. Morrill*, 26 Cal. 361; *Wilson v. Castro*, 31 Id. 420, 426; *Schultz v. Winter*, 7 Nev. 130.) The civil practice act does not restrict, but enlarges the cases in which different causes may be united. (Moaks Van. Plead. 750.) The rule to determine whether there be a misjoinder of causes is the rule of practice in equity. If the claims are of similar nature, involving similar principles and results, and may without inconvenience be heard and adjudicated together, they may be joined. (Moaks' Van. Plead. 750, 751, top; Story's Eq. Plead. 271, b.; Id. 530, 531, 532; 5 Ind. 313; 3d Md. Ch. 48; 9 Iowa, 424; 1 Chitty's Plead. 200.)

This action may be fairly likened to the common counts. For work and labor, for goods sold, for distinct penalties, etc. (1 Chitty's Pl. 200, 201; 16 Cal. 333, 336, 337, 345; 23 Id. 184; 4 Tenn. R. 229; 2 Blackf. 36; 3 Hill, 527; 53 N. H. 581; Hill & Denis, 233.) For tortious breach of duty. (11 Johnson, 479.) For damages and penalty against the sheriff. (*Pearkes v. Freer*, 9 Cal. 642.) For the enforcement of several mechanics' liens. (8 Nev. 227,

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231.) For the enforcement of several tax liens. (13 Iowa, 17.)

Although a tax is not a debt in the ordinary sense of the term, yet it is so far a debt that in the absence of any specific provision, an action of debt or assumpsit will lie for its recovery. (Cooley on Tax, 13, note 1; 1 Gill & Johns. 502; 2 Dutcher, 400, 404; 39 Iowa, 57, 61; 12 B. Monroe, 77, 80, 81; 2 Nevada, 60, 61; 2 Root Conn.; 3 J. J. Marshall; 19 Wallace, 227, 237.)

Several demands for debt may be united in one action. (1 Chitty's Plead. 200, note 2; 13 Johns. R. 462; 3 Blackf. 167, 168; 18 Pick. 231.)

III. The complaint is not ambiguous. (2 Comp. Laws, sec. 3232; Id. sec. 3214; Stats. 1867, p. 160, sec. 99.)

IV. The statute of limitations does not run against the state in an action to collect a tax. The state is not included unless expressly mentioned. (13 Wall. 92; 28 Miss. 763; 18 Johns. R. 228). The liability mentioned in section 16 is not a tax, because were it so, it would have included the state, etc., before the amendment of 1867. It must be a liability of the same character as contracts or obligations. The tax is a lien upon the defendants' mine and can not be discharged unless paid. (2 Comp. Laws, sec. 3159.) The statute of limitations is not a defense allowed in a tax suit. (2 Comp. Laws, sec. 3156; *State v. C. P. R. R. Co.* 10 Nev. 61.) A tax is not a penalty within the meaning of the act of limitations. (16 Cal. 332, 336, 337, 345; 22 Id. 366, 370; 23 Id. 181.)

V. The complaint states a good cause of action. The commissioners had the power to levy fifty cents on the one hundred dollars proceeds. The exception in the act of 1867 is void. (Art. 10 Const. Nevada; 2 Comp. Laws, sec. 3259; Cooley Cons. Lim. 502, 503; 3 Ohio St. Rep. 10, 15, 16; 5 Id. 589, 592; 3 Nev. 179, 180; 9 Wis. 410, 414, 415-423.)

VI. Where part of a statute which is not essential to other parts is unconstitutional, it should be treated as a nullity, leaving the rest of the enactment to stand as valid. (Cooley Cons. Lim. 177, 178; 3 Nev. 180; 8 Id. 342; 22 Cal. 386; 3 Ohio St. 1, 34.)

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Frank V. Drake, District Attorney of Storey County, also for Appellant.

I. Without express authority therefor the collection of taxes or revenue could not be enforced. (Cooley on Taxation, 13, 300.)

There is but one kind of action known to the revenue laws for the enforcement of the tax. Further, if we are to hold that either act is exclusive, we must hold the revenue laws to exclude the provisions of the code when inconsistent. (Comp. Laws, sec. 3160.) The practice act applies to *others* not the sovereign. (*Savings Bank v. U. S.* 19 Wall. 227.) Section 64 of the code is essentially an enlarging statute, not restrictive, and under it a variety of actions may be joined, which are not unitable at common law. (*C. P. R. R. Co. v. Dyer et al.*, 1 Sawyer, 641.)

II. The action of debt lies where a certain sum of money is to be recovered *in numero*, where debt is due by specialty upon an award for a specific sum, and upon a judgment. (3 Bacon's Abr., title "Debt," 83; *Id.* 84; *U. S. v. Lyman*, 1 Mass. C. C. 432; *Meredith v. U. S.*, 13 Peters, 486; *City of Dubuque v. I. C. R. R. Co.*, 39 Iowa 56; *Portland D. D. Co. v. Trustees*, 12 B. Mon. 77.)

If the sums sued for are a matter of record and determined by a record, or are evidenced in the form of a proceeding under a statute, or are determined in the form of a judgment and the distinguishing feature of a fixed sum due, requiring no future valuation, the action in "debt" lies, and it is immaterial as to the manner in which the obligations were incurred. (3 Sneed, Tenn. 145; 1 Dutcher, N. J. 506; 3 McLean, C. C. 150; 2 A. K. Marsh, Ky. 264; 1 Mass. C. C. 243; 1 Bow. Dict. "Debt," 3.) By the express terms of the statute the "liability" was created at the moment of the levy of the taxes, and upon the first day of each quarter year, a specific sum, ascertainable by computation, became due to the state from the defendant. (*State v. Esterbrook*, 3 Nev. 173; *State v. W. U. T. Co.* 4 Id. 338.)

If the government does extend its protection and aid to

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the citizen for his moneys paid in taxation, and as an equivalent, then the constitution is satisfied *but a contract* is created. (Burroughs on Tax. 253, sec. 105.) A compact creates a contract. (Bouvier's Dict. title "Contract;" Cooley on Tax. 14; Vattel, b. 1, ch. 20; *Bank of U. S. v. State*, 12 S. & M. 457; *Rhodes v. O'Furrell*, 2 Nev. 60.)

Whitman & Wood and Stone & Hiles, for Respondent.

I. The appeal is from a judgment entered against plaintiff on its own motion, so cannot be sustained. *Imley v. Beard*, 6 Cal. 666; *Evans v. Phillips*, 4 Wheaton, 73; *Vestal v. Burditt*, 6 Blackf. 555; 6 Id. 158; *Sleeper v. Kelly*, 22 Cal. 456; *Paul v. Armstrong*, 1 Nev. 96.

II. The demurrer was properly sustained by the district court.

The action was barred by the statute of limitation, not having been commenced within three years nor four years, save as to the twenty-first cause, and not as to that within two years, and this whether the tax be considered a debt arising out of contract or not. (C. L. 1031, 1034.)

Several causes of action were improperly united, as they did not come within statutory allowance of union. (C. L. 1100 and 1127.) They do not arise out of a contract, express or implied, as taxes are not so based. (Cooley on Taxation, 1; 1 Hilliard on Cont. 5; Hilliard on Tax. 17; Blackwell on Tax Titles, 195, 196; *Phil'a Ass. v. Wood*, 39 Pa. St. 73; Opinion of Judges, 58 Me. 591; *Judd v. Driver*, 1 Kan. 455; *Mitchell v. Williams*, 27 Ind. 62; *Hanson v. Vernon*, 27 Iowa, 28; *Loan Ass. v. Topeka*, 20 Wall. 664; *Clarke v. Nev. & M. Co.*, 6 Nev. 208; *Geren v. Gruber*, 26 La. An. 694; *Union Co. v. Bordelon*, 7 Id. 193; *Pittsburgh v. Commonwealth*, 3 Brews. Eq., Pa. 355; *Delaware v. Commonwealth*, 66 Pa. St. 64; *Trenholm v. Charleston*, 3 Rich. S. C. 347; *Bradley v. McAtee*, 7 Bush, Ky. 667; *Hilbish v. Catherman*, 64 Pa. St. 154; *Glasgow v. Rowse*, 43 Mo. 479; *City of Carondelet v. Picot*, 38 Id. 125; *Johnson v. Howard*, 41 Vt. 123; *City of Camden v. Allen*, 2 Dutcher, N. J. 398; *Pierce v. City of Boston*, 3 Met. 520; *Whiteaker v. Haley*, 2 Or. 139; *Mechanics' Bank v. Debol*, 1 O. St. 591; *De Pauw v. New*

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Albany, 22 Ind. 204; *Lane Co. v. Oregon*, 7 Wall. 80; *Perry v. Washburne*, 20 Cal. 318; *City of Augusta v. North*, 57 Me. 392; *Brown v. Rice*, 51 Cal. 489; *Dyer v. Barstow*, 50 Id. 652.

III. The judgment at bar must stand, if there is any sufficient foundation therefor, even though the district court may have given an erroneous reason for its action. (*Conley v. Chedic*, 6 Nev. 222.)

IV. Legally, the state does not appear, as it could only be represented by the district attorney in case of a delinquent tax; and the attorney-general makes no appearance, as, indeed, he could not properly do, the state having no cause of action. (*State of Nevada v. C. P. R. R. Co.* 10 Nev. 78.)

V. The legislature has provided but one method for the collection of delinquent taxes; that method is by suit, and it has provided certain methods of procedure which we claim must be followed by the state to the exclusion of all other methods.

VI. The practice act is, conjointly with the revenue laws, applicable to suits for the collection of delinquent taxes. The remedy which the sovereign may pursue in the collection of delinquent taxes rests largely, if not altogether, in the discretion of the sovereign. The remedy may be by suit, or by the arrest of the person taxed, or by distress of goods and chattels, or by taking possession of goods and chattels and retaining them until the taxes are paid, or selling them for payment, or by imposing penalties for non-payment, or by forfeiting to the government the property upon or in respect to which the tax is payable, or by the sale of lands, or by making the payment a condition to the exercise of some lawful right.

Where a statute gives a new right and prescribes a particular remedy, such remedy must be strictly pursued, and is exclusive of any other. It is true, however, that if the right existed at common law, the party may pursue the common law remedy. The statutory one in such cases is regarded as cumulative merely. (*People v. Craycroft*, 2 Cal. 243; *Ward v. Severance*, 7 Id. 126; *Andover and M. Turnpike*

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Co. v. Gould, 6 Mass. 40; *Dyer v. Barstow*, 50 Cal. 652; *Brown v. Rice*, 51 Id. 489.)

VII. The practice act is exclusive of all common law and equity forms and methods of procedure in suits at law and in equity in the courts of this state. (*Pomeroy on Remedies*, sections 513, 515; *White v. Joy*, 13 N. Y. 90; *People v. Ryder*, 12 Id. 438, 439; *Hentsch v. Porter*, 10 Cal. 558; *Richards v. Edick*, 17 Barb. 262.)

C. J. Hillyer, also for Respondent.

By the Court, LEONARD, J.:

This action was commenced on the fourteenth day of January, 1878, to recover certain taxes (including penalties for non-payment as required by law) upon the proceeds of respondent's mine, alleged to be due and delinquent for twenty-one quarter years, the first quarter commencing July 1, 1867, and the twentieth, July 1, 1872, while the twenty-first quarter commenced October 1, 1875, and ended December 31, 1875.

The complaint contains twenty-one counts, each being called a cause of action, and in each count all the facts required by the statutory form of complaint in tax suits are alleged. It is also alleged that a part of each of the twenty-one quarters' taxes has been paid by defendant, the Yellow Jacket Silver Mining Company, but that it has neglected and refused to pay the balance of the same, and that, in the aggregate, there is due from defendants to plaintiff on account of, and by reason of, the several levies of taxes, and of the several delinquencies and penalties, the full sum of fifty-nine thousand seven hundred and sixty-nine dollars and forty-one cents, in United States gold coin.

Judgment is asked against the Yellow Jacket Silver Mining Company for the amount claimed, and separate judgment against its mine described for the same sum, and that a decree be entered adjudging said taxes and penalties for the several quarters stated, to be liens upon the said mine or mining claim.

The defendant, the Yellow Jacket Silver Mining Com-

pany, is a corporation organized and existing under and by virtue of the laws of this state, and has been such corporation since the first day of January, 1865; and its mine, described in the complaint and made a defendant therein, the proceeds of which it is alleged were taxed and assessed, is situate in Gold Hill mining district, Storey county, Nevada. It appears also from the transcript, and it was so stated at the oral argument, that similar actions were brought to recover back taxes, etc., against the Savage Mining Company, the Belcher Silver Mining Company, the Consolidated Virginia Mining Company, the Hale and Norcross Silver Mining Company, the Crown Point Gold and Silver Mining Company, the Ophir Silver Mining Company, the Kentucky Mining Company, the Chollar-Potosi Mining Company, and the Sierra Nevada Mining Company, together with the mining claim of each. A part or all of the defendants last named are foreign corporations, but the mining claim of each is situate in Storey county, Nevada.

To the complaint filed in each case, a demurrer was interposed, similar, as we understand, to the one filed in this case, and they were each and all sustained by the court. The state refused to amend, and judgments were entered for the respective defendants. Both parties desire the decision in this case to cover all those mentioned above; that is to say: We are asked to decide whether or not the demurrer herein was properly sustained, and to have the decision embrace so many of the grounds of demurrer stated as may be necessary in order that our conclusions may be decisive of the other cases mentioned, as well as this.

Among others, defendants demurred upon the following grounds:

1. That each, every, and all the causes of action stated in the complaint, were barred by the statute of limitations of this state.
2. That several causes of action had been improperly united in the complaint.
3. That the complaint did not state facts sufficient to constitute a cause of action.

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If we mistake not, the other grounds of demurrer need not be stated or considered.

And first, the Yellow Jacket Silver Mining Company being a domestic corporation, and its mine described in the complaint being situate in this state, are all or any of the causes of action stated in the complaint barred by the statute of limitations?

I. During the whole period stated in the complaint, taxes on the proceeds of mines became delinquent as follows: For quarters commencing January 1st and ending March 31st, on the fourth Monday in June following; for quarters commencing April 1st and ending June 30th, on the fourth Monday in September following; for quarters commencing July 1st and ending September 30th, on the fourth Monday in December following; for quarters commencing October 1st and ending December 31st, on the fourth Monday in March following. (C. L. 3221.) Within three days after the fourth Monday in June, September, December, and March of each year, it became the county auditor's duty to deliver the delinquent list, then in his hands, to the district attorney, whose duty it was, immediately to commence action, in the name of the state, against the person, firm, incorporated company, or association so delinquent, and against the mines or mining claims from which the gold and silver-bearing ores, quartz or minerals were extracted and assessed, so delinquent. (C. L. 3230, 3231.) The result, therefore, is, that all the taxes alleged to be due in this case, except those stated in the twenty-first cause of action, were delinquent on or before the fourth Monday in December, 1872, and that a cause of action accrued as to each quarter's taxes within three days at least, after the same became delinquent; that the amount alleged to be due in the twenty-first cause of action (twenty-four dollars and twenty-three cents) became delinquent on the fourth Monday in March, 1876.

The statutes of this state provide as follows: "Civil actions can only be commenced within the periods prescribed in this act, after the cause of action shall have accrued, except where a different limitation is prescribed

by statute.” (C. L. 1016.) * * * “Actions other than those for the recovery of real property can only be commenced as follows: Within three years—First, an action upon a liability created by statute other than a penalty or forfeiture. * * * Within two years—First, an action upon a contract, obligation or liability not founded upon an instrument of writing. * * * Fifth, an action upon a statute for a forfeiture or penalty to the state.” (C. L. 1031.) “An action for relief, not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued.” (C. L. 1033.)

“The limitations prescribed in this act shall apply to actions brought in the name of the state, or for the benefit of the state, in the same manner as to actions by private parties.” (C. L. 1034.)

In our opinion, under the provisions of the statutes quoted, all the causes of action contained in the complaint in this case, with the exception of the last, are barred. Nor is it necessary to decide that they are included within any of the subdivisions of section 1031, in order to be driven to such conclusion. If they are not embraced within that section, they certainly must be covered by sections 1033 and 1034.

That the common law maxim, “*nullum tempus occurrit regi*,” does not apply to, and has not been in force in, this state since the adoption of section 1034 in 1867, is too plain for argument. That the legislature had the power to include the state within the provisions of the statute of limitations is not questioned. In *The United States v. Hoar*, 2 Mason, C. C. R. 312, Mr. Justice Story says: “It may be laid down as a safe proposition that no statute of limitations has been held to apply to actions brought by the crown, unless there has been an express provision including it.”

“Limitations are created by, and derive their authority from, statute.” (*People v. Gilbert*, 18 Johns. 227.)

In *The People v. The Supervisors of the County of Columbia*, 10 Wend. 365, the court says: “By the revised statutes (2 R. S. 295–97, sec. 18–28) the same limitations of actions apply to the people of the state as to individuals.

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* * * If the state neglects to prosecute for the period which protects individual claims, it loses the demand in the same manner as individuals do."

"Our statute of limitations embraces all characters of actions, both legal and equitable." (*White v. Sheldon*, 4 Nev. 288.) And it may be added, that it embraces every civil action, both legal and equitable, whether brought by an individual or the state; and if the cause of action is not particularly specified elsewhere in the statute, it is embraced in section 1033, and the action must be commenced within four years after the cause of action accrued. Such is the plain reading of the statute and the evident intention of the legislature. In many other states besides this the state is limited, the same as individuals. So it is in New York, Massachusetts, and California.

It is urged by counsel for plaintiff that the statute has not run against any or all of the causes of action stated, because the revenue laws provide that a lien shall attach upon the mine, "which shall not be satisfied or removed until all taxes are paid, or the title to the mine has absolutely vested in a purchaser under a sale for the taxes levied on the proceeds thereof." (C. L. 3156, 3250.)

The revenue law of 1861, as well as that of 1865, created a lien upon the real property of the person assessed, to secure payment of the taxes due from such person. During that period, and until 1867, the statute of limitations did not run against actions for delinquent taxes, because, until the last-mentioned date, the state was not, by express provision, included by that statute. But in 1867, when the statute creating and continuing the lien was in force, the legislature declared that the statute of limitations should apply to actions brought in the name of the state, or for the benefit of the state, in the same manner as to actions by private parties. That statute must apply to tax suits unless they are excluded from its operations by some other statute. The only ones claimed to have that effect are those mentioned, creating and continuing the lien, passed both before and after section 1034. (See C. L. 3250; statute 1867, 164; statute 1871, 89; statute 1873, 96.)

The question presented then, is this: "Do the several statutes just mentioned, either except taxes from the operation of the statute of limitations, or extend the time for bringing suits for their collection beyond the period allowed by that statute? They are substantially as follows: "Every tax levied under the authority or provisions of this act, on the proceeds of mines, is hereby made a lien on the mines or mining claims from which ores or minerals bearing gold and silver, or either, or any other valuable metal, is extracted for reduction, which liens shall attach on the first days of January, April, July and October of each year, for the quarter-year commencing on those days respectively; and shall not be satisfied or removed until the taxes, as provided in this act, on the proceeds of mines, are all paid, or the title to said mines or mining claims has absolutely vested in a purchaser, under a sale for the taxes levied on the proceeds of such mines or mining claims." (C. L. 3250.)

All that can be claimed under the statute quoted is, that the lien created continues indefinitely, or until the tax is paid, or the property is sold under tax sale. Does that fact establish what is claimed, that the remedy to enforce collection by suit is not barred?

The revenue laws have given two remedies to enforce by action the collection of delinquent taxes, one against the person and the other against the property, and neither depends upon the other for its existence or efficiency. (*O'Grady v. Barnhisel*, 23 Cal. 294.)

A personal judgment may be given in a proper case, and also a separate judgment against the property. Upon such judgments executions may issue as in other civil cases. A lien is also created, the effect of which is to subject the property to the payment of the tax, although it may have passed into other hands subsequent to the date of the lien. But in order to obtain a judgment against the personal defendant, or against the property, or to enforce the lien, an action like the one we have in hand must be brought; that is the remedy provided by statute if the taxes are not voluntarily paid. It is the only remedy permitted except the summary one mentioned in section 3222.

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The lien cannot be enforced, the property can not be sold, without the aid of the remedy provided—that is, by suit; and if that is barred, the remedy is lost, although the right may remain, as in other cases. The creation of a lien upon the mine certainly could not prevent the operation of the statute as to the other defendant, the Yellow Jacket Silver Mining Company. A lien is only security, whether it be given by statute, judgment, mortgage or pledge. A mortgage may be given to secure the payment of an account. The statute would run against the latter in three years and the former in six. The mortgagee has two remedies, one upon the debt and the other upon the mortgage. If he postpones suit until after the statute has run against the debt, he may still foreclose his mortgage within the six years, but he can have no personal judgment against the mortgagor for any deficiency. So, in this case, should it be admitted that plaintiff can sustain an action to enforce the lien created by statute, still it has lost its personal remedy. We could not arrive at any other conclusion without doing violence to a plain expression of the legislative will. But has not plaintiff lost its remedy as to the property also? Appellant says no; because the statute provides that the lien shall continue until the tax is paid. Suppose it does. It is common learning, that a lien may continue after the remedy for its enforcement is lost. A mortgage debt is not destroyed or extinguished by the statute of limitations. The remedy only is taken away. (*McCormick v. Brown*, 36 Cal. 180; *Sichel v. Carrillo*, 42 Id. 493.)

“The statute does not destroy the right, but only bars the remedy. Hence, if the claimant has any means of enforcing his claim, other than by action or suit, the statute can not be set up to prevent his recovering by such means.” (Darby and Bosanquet on Stat. Lim. 10.)

“An action of assumpsit by a pawnee, to recover a simple contract debt, is not the more protected from the operation of the statute because accompanied with property pledged as collateral security; for it is not, on that account, less subject to the mischief against which the statute was

intended to guard. But though it be clear in such case that the remedy to enforce the debt may be barred, yet the lien upon the property pledged will remain." (Angell on Lim. sec. 73; see, also, *Henry v. The Confidence Company*, 1 Nev. 621.)

It is plain to our minds that the creation and continuation of a lien did not extend the time for bringing tax suits, beyond the period allowed by the statute of limitations, nor did it exempt taxes from the operation of the statute, either as to the corporation defendant or the property. Had the statute created the lien without providing for its continuance until the tax should be paid, the result would have been the same—the lien would have continued when once created until payment, or until the repeal of the statute creating it.

The Massachusetts tax act of 1824 provided as follows: "Whenever a tax shall be assessed on any real estate liable to taxation, said tax shall be a lien on said estate," etc. It did not, in terms, provide for a continuance of the lien, but the court said in *Hayden v. Foster*, 13 Pick. 495, "Nor do we entertain a doubt that such lien continues until the tax is paid."

This, then, is our case upon the question under discussion. A statutory lien is created, which still exists, but which cannot be enforced, nor can judgment be obtained against either of the defendants, without this or a similar action, which is barred by the statute.

Counsel for appellant also claim, that the statute of limitations is not a defense allowed in tax suits, and that no defense can be raised by demurrer, which is not permissible by answer under section 3156.

We said, a few days ago, in the case of *The State ex rel. Lake v. The Board of County Commissioners of Washoe County*, that "the concluding sentence of that section (3156), 'and no other answer shall be permitted,' must be understood with this qualification: that it does not exclude the direct denial of any allegation of the complaint, necessary to be proved, in order to entitle the state to recover."

No more does it prohibit raising the issue of law, that

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admitting the facts stated, plaintiff cannot maintain its action. If the plaintiff does not state a cause of action in its complaint, or if it states facts which, if not waived, are a bar to the action, the defendant may protect himself by proper pleading, as in other cases. Indeed, it is difficult to perceive why the defendant may not demur for any of the reasons stated in the civil practice act. As will be seen further on, the civil practice act is made applicable to tax suits, so far as it is consistent with the revenue law, and there is nothing in the law last named inconsistent with the practice act in relation to demurrers, unless it be section 3156.

It is evident that that section does not refer to demurrers. Its opening sentence is: "The defendant may answer, which answer shall be verified." It refers only to a pleading which contains denials or averments of facts constituting a defense to the matters of fact alleged in the complaint. Who can say there is not the same necessity for interposing a demurrer in a tax suit as any other? If the complaint does not state facts sufficient to constitute a cause of action, there is nothing to try. If it is ambiguous, unintelligible or uncertain, it should be made plain. If the court has no jurisdiction of the person of the defendant, or of the subject of the action, it cannot proceed with the case. If it appears upon the face of the complaint that the action is barred, no cause of action is stated, if the defendant interposes the proper plea. Before the defendant can be required to answer in a tax suit, or any other, a valid, subsisting cause of action must be alleged against him. Besides, the law making the statute of limitations applicable in actions brought by the state, the same as in actions by private parties, was passed two years subsequent to section 3156 of the compiled laws, and is, consequently, the controlling statute, so far as this defense is concerned. The demurrer to the twenty causes of action first stated was properly sustained as to both defendants, for the reason that they were barred by the statute of limitations. The twenty-first cause of action was not barred, but the court below had no original jurisdiction, and this court has no

appellate jurisdiction, over a case involving the amount therein claimed.

II. Have several causes of action been improperly united in the complaint?

Although this question was argued with signal ability by counsel on both sides, still we find it full of difficulties. It will be our endeavor to so construe the different statutes touching this question, that our conclusion will harmonize with reason and the majority of adjudicated cases.

As we have seen, the revenue law makes it the duty of the district attorney to bring suit immediately after receiving the delinquent list of each quarter; and the only provision made by that law in relation to the complaint, or what it may or shall contain, is found in sections 3232 and 3160, C. L.

The first section mentioned prescribes the form that may be used for one quarter's taxes only, and neither that section nor any other, in terms, provides or intimates that more than one quarter's taxes may be enforced in the same action. In other words, the revenue law is silent upon the question, with the exception of section 3160.

That section provides as follows: "An act to regulate proceedings in civil cases in the courts of justice in the state of Nevada, approved November 29, 1861, and the several amendments thereto, or amendments which may hereafter be made thereto, or laws passed under the government of the state of Nevada, so far as the same are not inconsistent with the provisions of this act, are hereby made applicable to the proceedings under this act."

It is plain that the only test as to whether any portion of the civil practice act of 1861 was made applicable to proceedings in tax suits, brought under the revenue law, is whether or not such portion was *inconsistent* with the provisions of the revenue law. If any section of the former act is consistent with all the provisions of the latter, it must be considered and followed with the same particularity as though it was included in the body of the revenue law. It is common for legislatures to refer to other statutes, as was done in this case, and by such reference only, to desig-

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nate the powers given under the latter act. When that is done without limitation, the statute referred to is to be considered as incorporated in the one making the reference. (*Turner v. Wilton et al.*, 36 Ill. 393.) If the operation of the statute referred to is limited by the act making the reference, then the former is considered as incorporated in the latter, with the limitations mentioned. The legislature must have had some object in view in making all consistent provisions of the practice act applicable to the revenue law. In 1861, a revenue law was passed and approved, November 29th. In its principal features it was similar to the revenue law of 1865. The revenue law of 1861 and the practice act of 1861 were both approved on the same day, and the latter was made applicable to the former, so far as it was consistent.

The legislature knew that no provision had been made in the revenue law as to many necessary points or matters of pleading and practice. They knew, also, that it was not desirable to adopt a new system for the collection of delinquent taxes, except so far as circumstances rendered such change necessary. The legislature, therefore, with the best of reasons, made the practice act the controlling law in tax suits as much as it was in other civil cases, except when inconsistent with the provisions of the revenue law. We have no doubt that the legislature intended to make the civil practice act of 1861 applicable as stated; nor have we any doubt that the civil practice act of 1869, now in force, is applicable to the same extent. Such would probably have been the effect had the practice act of 1861 only, been referred to and made applicable to the revenue law of 1865. (*Kugler's Appeal*, 55 Pa. St. 125; *McKnight v. Crinnion*, 22 Mo. 560.)

But the revenue law now in force (C. L. 3160), not only made the civil practice act of 1861, then in force, applicable, but also its several amendments, or amendments which might thereafter be made thereto, or laws passed under the government of the state of Nevada, so far as consistent. The apparent intention was to make the civil practice act

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in force at the time a tax suit should be brought, applicable, unless inconsistent with the revenue law.

Nothing need be said in addition to what is expressed in the first portion of this opinion, in relation to defendant's right to demur upon the ground of misjoinder of causes of action. There is nothing in the revenue law against it, directly or indirectly, and the civil practice act permits it. Besides, every conceivable reason favors such a proceeding in tax suits as well as in others. The fortieth section of the practice act is not inconsistent with the revenue law, and in tax suits any ground of demurrer therein stated may be urged. The same conclusion must follow in relation to section 64. It is not inconsistent with any of the provisions of the revenue law. That section provides that "the plaintiff may unite several causes of action in the same complaint, when they all arise out of: First—Contracts, express or implied; * * * But the causes of action so united shall all belong to only one of these classes, and shall affect all the parties to the action, and not require different places of trial, and shall be separately stated."

If the different quarters' taxes are separate and distinct causes of action, and if it shall be found that no other causes of action can be united in one complaint, than those permitted by section 64, it is not contended that those united in the complaint in this case can be so joined, unless they are embraced in the first subdivision quoted—that is, unless a tax upon the proceeds of mines is a debt or liability arising out of an express or implied contract.

The question, then, that now presents itself is this: Although section 64 is applicable to tax suits, can any other causes of action be united, except those specified therein? Does the express permission to unite those stated in that section prohibit the union of others not mentioned therein, which, under the old equity practice, could have been joined in the same complaint? Is our code "the only source of authority from which rules of pleading may be drawn, and have its methods so completely supplanted those which preceded it that the latter can no longer be appealed to as possessing of themselves any force and authority?"

The practice act now in force is entitled, "An act to regulate proceedings in civil cases in the courts of justice of this state, and to repeal all other acts in relation thereto."

Section 1 declares that "there shall be in this state but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs."

Section 37 provides that "all the forms of pleading in civil actions, and the rules by which the sufficiency of the pleadings shall be determined, shall be those prescribed in this act."

By section 38 it is provided that "the only pleadings on the part of the plaintiff shall be the complaint or demurrer to the defendant's answer; and the only pleadings on the part of the defendant shall be the demurrer or the answer."

It seems to us that sections 37 and 38, when construed together, plainly mean this and nothing more: That the complaint, answer and demurrer are sufficient, when they square with the rules prescribed by the civil practice act, and not otherwise. We think, also, that the provision in section 37, that "the rules by which the sufficiency of pleadings shall be determined shall be those prescribed in this act," exclude the consideration of other rules. It is said that "a statute containing a mere affirmative provision, without any negative, expressed or implied, does not alter any common law rule existing in regard to its subject matter before the statute." (Sedgwick on the Construction of Stat. and Const. Law, 29.) But there is, in section 37, a plainly implied negative. (7 Iowa, 276; 36 Conn. 375; 20 Ark. 420.) Let us test the conclusion at which we have arrived by some provisions of the practice act.

Section 39 declares what, in general terms, the complaint shall contain, whether legal or equitable relief, or both, are claimed. Section 40 provides within what time and upon what grounds the defendant may demur to the complaint. Seven grounds of demurrer are stated. No one would argue that a demurrer can be interposed in this state for any other reason than those stated. Even Mr. Moak, in his *Van Santvoord's Pleadings*, says on page 750:

“The first of these, that is, the misjoinder of claims or causes of action between the same parties, is specifically provided for in the seven several subdivisions of section 167 of the code as amended. And here the remark made in *Manchester v. Storrs* (3 How. Pr. 410), in respect to a demurrer for the misjoinder of several causes of action, may be repeated; that ‘we must forget all rules respecting demurrers, and regard a demurrer now as a pleading created, with its character and office defined by the code. No demurrer will lie except to a complaint, nor for any other causes except the six grounds specified in section 122, now 144.’” And yet he holds that causes of action not mentioned in the practice act may be united, if they are such as might have been joined under the former equity practice.

We do not perceive why a different rule should obtain in relation to demurrers from that concerning joinder of different causes of action. The language of the code is the same in both cases. “The defendant may demur,” etc. (Sec. 40.) “The plaintiff may unite several causes of action in the same complaint, when they arise out of,” etc. (Sec. 64.) If the conclusion arrived at by the author is based upon the fact that “there are remedies, well known to our jurisprudence, which still exist, and which can not be comprised in either of the subdivisions of section 167” (corresponding with section 64), as seems to be the case, then why not be consistent, and arrive at the same conclusion in relation to demurrers? It is well known that the code does not specify all the grounds of demurrer that were known and permitted before the code.

In *White v. Joy*, 13 N. Y. 89, the court said: “Departure in pleading is defined to be, when a party quits or departs from the cause or defense which he has first made, and has recourse to another. * * * Prior to the code, a demurrer would lie for a departure in pleading; but is a demurrer authorized by the code for such fault in pleading? * * * It is proper to remark, that since the code, parties must find their authority for pleading in the code, and if the authority is not found there for any pleading put in, and it is not a case where a demurrer is authorized, the

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remedy is by motion to strike out. It is an irregularity to put in pleadings not authorized by the code. All the cases in which a demurrer may be interposed are clearly specified."

Without quoting, we refer especially in this connection to *Dyer v. Barstow*, 50 Cal. 562, and *Brown v. Rice*, 51 Cal. 489.

So, examining the statute outside of pleadings, who would say that an injunction, certiorari or mandamus can be granted, except for the reasons stated in the practice act; or that a new trial can be had except upon grounds therein stated? Who would think of taking an appeal except in the cases prescribed in title nine? And is any other act or omission a contempt, save those mentioned in section 460?

We shall make two brief quotations in addition to the foregoing, and close this branch of the case: "There is no intermingling of a former practice where the provisions of the code are specific. The whole plan of prosecuting appeals and reserving questions is contained in their (New York) code, and there only. All the former machinery, cumbrous and elaborate as it was, far more so than our own, is entirely superseded by the code. Any legal gentleman in that state, who should adhere to the old practice, setting it up against the new, would only make himself ridiculous. So in this state. Wherever the code has made affirmative provisions, the former practice is obsolete. The only thing which looks to keeping alive the old practice, is that one provision already alluded to, of very doubtful constitutional validity, which provides for omitted cases. Everything else has fallen before the express and detailed provisions of the code. This is the last expressed will of the legislature, and on the plainest principles of statutory construction, as well as in express terms, it abrogates everything in the former practice, and all enactments inconsistent with it." (*Jolly v. Terre Haute Drawbridge Co.*, 9 Ind. 427.)

We quote also from Mr. Pomeroy's excellent work on "Remedies and Remedial Rights," p. 545. He says: "Before entering upon the matter thus outlined, a preliminary question presents itself, upon the answer to which much of the succeeding discussion must turn. The question involves the true relations between the doctrines and rules of plead-

ing enacted by the codes and those which existed previously, as parts of the common law and the equity jurisprudence, and may be stated as follows: Are the doctrines and rules contained in the statute to be regarded as the sole guides in pleading under the reformed procedure? or are the ancient methods still controlling, except when inconsistent with some express provisions of the later legislation?" And after stating the views of different courts, etc., he concludes as follows: "During the earlier periods of the present system, there was an evident disposition on the part of some judges and courts to adopt the former of these two views, and to hold that the old methods, rules and requisites of the common law and of equity are still applicable in substance, when not inconsistent with the provisions of the statute; or, in other words, that they had been supplanted only so far as such inconsistency extends. The second theory has, however, been generally, if not universally, adopted, as the true interpretation to put upon the language of the codes, and as the starting point in the work of constructing a system of practical rules for pleading. The proposition, as stated in the foregoing paragraph, has been expressly announced in well-considered judgments; in the vast majority of instances, however, it has rather been assumed and impliedly contained in the decision of the court, yet none the less passed upon and affirmed. It may now, I think, be regarded as the established doctrine, that the code in each of the states is the only source of authority from which rules of pleading may be drawn; that its methods have completely supplanted those which preceded it, so that the latter can no longer be appealed to as possessing of themselves any force and authority."

In our opinion it is wisdom to preserve the plain, simple methods and rules of the code, in pleading and practice; and if section 64, or any other, does not, in terms, embrace all that is desirable, then let us appeal to the legislature for aid, rather than to judicial legislation. It is proper to refer briefly to certain authorities to which our attention has been called in this connection.

Bowers v. Keesecher, 9 Iowa, 424, and *Byington v. Woods*,
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13 Id. 20, were decided under statutes justifying the conclusions of the court, but by reason of the great difference between those statutes and ours they throw no light upon this case. (See Laws of Iowa, revision of 1860, and 13 Id. 20.)

People v. Seymour, 16 Cal. 340, was brought under a special statute legalizing the assessments of taxes in the city and county of Sacramento for the years 1858 and 1859, and authorizing their collection.

People v. Todd, was a similar action, brought to recover taxes for 1858, 1859 and 1860, under a similar statute.

It is not necessary to decide whether by those statutes it was the evident intention of the legislature to permit taxes against the same person and the same property for the different years, to be collected in the same suit, because the question here presented was not in any manner raised or suggested in either of those cases. So, in any event, they are not authority in this case upon the question of misjoinder of causes of action.

Dejo v. Rood, 3 Hill, 528, was decided in 1842, before the adoption of the code, and the decision was placed expressly upon the common-law doctrine allowing several penalties to be recovered in the same suit. The same is true of *City of Brooklyn v. Cleves*, Hill & Denio, 233, and *Church v. Mumford*, 11 Johns. 479.

Kempton v. Savings Institution, 53 N. H. 583, was brought under a penal statute which provided that "if any person upon any contract receives interest at a higher rate than six per cent. he shall forfeit three times the sum so received in excess of said six per cent. to the person who will sue therefor." The question before the court was whether that statute authorized a separate suit for every separate reception of usurious interest on the same contract. And the statute having been penal, and hence its operation and effect could not be extended by implication, and the court being of the opinion that the statute did not, in terms, authorize a separate suit for each breach any more than that the whole must be included in one suit, it was deemed the best policy to resolve the doubt according to the well-

established doctrine, that "the law does not favor or encourage a multiplicity of suits."

Pearkes v. Freer, 9 Cal. 642, was an action against a sheriff to recover damages sustained by reason of his failure to execute and return process, with the addition of two hundred dollars imposed by law as a penalty for such neglect. The statute provided that for such failure the sheriff should "be liable in an action to the party aggrieved for the sum of two hundred dollars, and for all damages sustained by him." A demurrer was interposed to the complaint on the ground that two distinct causes of action had been improperly united. The court said: "It is not the policy of the law to promote multiplicity of actions, and by no rule of construction of which we have any knowledge can we arrive at the conclusion that the legislature intended that two suits were necessary to enable a party to avail himself of the remedy given by this statute."

The fact is, that although there were two kinds of relief, there was but one cause of action. (*Pomeroy's Remedies*, 486, *et seq.*)

We are also referred to *Skyrme v. Occidental Co.* (8 Nev. 231), an action to enforce several mechanics' liens. The court in that case said: "The plaintiff need not have brought suit to foreclose any but his own lien, and then, by pursuing the provisions of the statute, would have had the right to exhibit proofs as to the others. * * * But by bringing suit upon all the liens (doing more than was necessary) he did not, in our judgment, lose the right to have the assigned liens enforced." (See, also, *Hunter & Co. v. Truckee Lodge*, decided at the last January term, and *Ivers v. Elliott*, 6 Nev. 290.)

But it is argued by counsel for appellant:

1. That there is in fact but one cause of action stated in the complaint, although the different quarters' taxes and penalties are set out as distinct causes.

2. That if there are as many separate and distinct causes of action as there are delinquencies stated in the complaint, still a tax is in the nature of a debt, and those al-

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leged to be due in this case can all be recovered in one action.

If the complaint contains but a single cause of action, whatever else it may contain, we are of the opinion that the defendants cannot successfully demur on the ground that several causes of action have been improperly united. (*Hillman v. Hillman*, 14 How. Pr. 459.)

In *Mayer v. Van Collem* (28 Barb. 231), a cause of action is defined to be "the right which a party has to institute and carry through a proceeding for the enforcement or protection of a right, the redress or prevention of a wrong." "The complaint states the facts showing this right. The unity of the right to be enforced, or of the wrong to be redressed, constitutes the unity of the action." (Id.) Mr. Pomeroy says: "Every action is based upon some primary right by the plaintiff, and upon a duty resting upon the defendant corresponding to such right. By means of a wrongful act or omission of the defendant, this primary right and this duty are invaded and broken; and there immediately arises from the breach a new remedial right of the plaintiff and a new remedial duty of the defendant. Finally, such remedial right and duty are consummated and satisfied by the remedy which is obtained through means of the action and which is its object. * * * * * The cause of action, therefore, must always consist of two factors: 1. The plaintiff's primary right and the defendant's corresponding primary duty, whatever be the subject to which they relate, person, character, property or contract. 2. The delict, or wrongful act or omission of the defendant by which the primary right and duty have been violated. Every action, when analyzed, will be found to contain these two separate and distinct elements, and, in combination, they constitute the cause of action." (Sec. 519.)

The two combined elements in this case, then, were (1) the state's right to a quarterly payment of taxes alleged to be due, and the defendant's duty to pay the same at the times provided by law; and (2) the omission to pay when required. The combined elements necessary to constitute

a cause of action existed as to each quarter's taxes as soon as the auditor handed over to the district attorney the delinquent list for such quarter. At that time, then, the state had a cause of action, and the right to bring it. If the statute of limitations had not barred an action for any part of the taxes alleged to be due, and if the state had obtained judgment in an action brought to recover the amount claimed to be due for the last quarter only, would such judgment be a bar to an action or actions for the recovery of amounts alleged to be due for the preceding quarters? If such judgment for a part would bar an action for any or all taxes claimed for previous quarters, then only one cause of action is stated in the complaint. On the contrary, if such judgment would not be a bar, then there are twenty-one causes of action stated in the complaint.

"The principle is settled beyond dispute that a judgment concludes the rights of the parties in respect to the cause of action stated in the pleadings on which it is rendered, whether the suit embraces the whole or only a part of the demand constituting the cause of action. It results from this principle, and the rule is fully established, that an entire claim, arising either upon a contract or from a wrong, cannot be divided and made the subject of several suits; and if several suits be brought for different parts of such a claim, the pendency of the first may be pleaded in abatement of the others, and a judgment upon the merits in either will be available as a bar in the other suits. * * * But it is entire claims only which cannot be divided within this rule—those which are single and indivisible in their nature. The cause of action in the different suits must be the same. The rule does not prevent, nor is there any principle which precludes, the prosecution of several actions upon several causes of action. The holder of several promissory notes may maintain an action on each; a party upon whose person or property successive distinct trespasses have been committed, may bring a separate suit for every trespass; and all demands, of whatever nature, arising out of separate and distinct transactions, may be sued upon separately. It makes no difference that the causes of

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action might be united in a single suit; the right of the party in whose favor they exist, to separate suits, is not affected by that circumstance, except in proper cases, for the prevention of vexation and oppression, the court will enforce a consolidation of the actions. * * * The true distinction between demands or rights of action, which are single and entire, and those which are several and distinct, is, that the former immediately arise out of one and the same act or contract, and the latter out of different acts or contracts. Perhaps as simple and safe a test as the subject admits of, by which to determine whether a case belongs to one class or the other, is by inquiring whether it rests upon one or several acts or agreements. In the case of torts, each trespass or conversion, or fraud, gives a right of action, and but a single one, however numerous the items of wrong or damage may be; in respect to contracts, express or implied, each contract affords one, and only one, cause of action. The case of a contract containing several stipulations to be performed at different times is no exception. Although an action may be maintained upon each stipulation as it is broken, before the time of performance of the others, the ground of action is the stipulation, which is in the nature of a several contract. Where there is an account for goods sold, or labor performed; where money has been lent to, or paid for, the use of a party at different times, or several items of claim spring in any way from contract, whether one only or separate rights of action exist, will, in each case, depend upon whether the case is covered by one or by separate contracts. The several items may have their origin in one contract, as on an agreement to sell and deliver goods, or perform work, or advance money; and usually, in case of a running account, it may be fairly implied that it is in pursuance of an agreement that an account may be opened and continued, either for a definite period or at the pleasure of one or both parties. But there must be either an express contract, or the circumstances must be such as to raise an implied contract, embracing all the items, to make them, where they arise at different times, a single or entire demand or cause of action."

(*Secor v. Sturgis*, 16 N. Y. 554–558, and cases there cited.) We know of no plainer condensed statement of the law upon the subject in hand than the above. (See *Staples v. Goodrich*, 21 Barb. 317; *The Erie & New York City R. R. v. Patrick*, 2 Keyes, 256; *Secor v. Sturgis*, 2 Abb. Pr. 70; *Cashman v. Bean*, 2 Hilt. 341; *Reformed Protestant Dutch Church v. Brown*, 54 Barb. 199; *Boyce v. Christy*, 47 Mo. 72.)

It is true that one law is the sole authority for the different acts required in tax matters. That law creates liabilities, but it also requires the performance of certain acts in a specific way before payment can be enforced. A valid assessment is an indispensable basis for the support of a tax. On real and personal property an annual levy is made by the law for state purposes, and by the county commissioners for county purposes. The methods are different, but the result, in both cases, is a yearly levy, and each levy is separate from that of any other year. So it is as to assessments. Each is and must be an assessment for one year only. (*People v. Hastings*, 29 Cal. 452.) Separate tax lists, tax rolls and delinquent lists are required and kept for each year. Each lien created is a lien for that year's taxes, and suits can be, and under the law should be, brought independently of suits for the taxes of other years.

There is no provision allowing delinquent taxes of one year to be added, or attached, to those of another year. Any errors in one year's assessment, levy, or other act required, does not affect the collection for any other year. Each year a lien attaches upon the real property assessed, for the tax levied upon the personal property of the owner of such real estate, but only for that year. Each delinquent list, or a copy thereof, certified by the county auditor, showing unpaid taxes against any person or property, is *prima facie* evidence in any court to prove the assessment, property assessed, and that all the forms of law in relation to the assessment and levy of such taxes have been complied with. Hence different evidence is necessary to support an action for each year's taxes.

“Where the act complained of is indivisible, a plaintiff

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cannot separate it and bring one action for one part and another for another; and the test by which to determine whether causes of action are the same is to inquire whether the same evidence will be necessary to support them." (*Crips v. Talvande*, 4 McCord (S. C.), 20.)

What has been said in relation to real and personal property is entirely applicable to the proceeds of mines, with this difference: In the first instance, as well as in the second, the levy is made yearly, but after the levy, the different acts in relation to proceeds of mines are required to be done quarterly. It must be admitted that if taxes upon the proceeds of mines for different quarters constitute but one single cause of action, then those upon real and personal property, for different years, must fall under the same rule. After a careful examination of the revenue law, it seems to us that if the taxes delinquent for several different years in the one case, and for different quarters in the other, constitute but one cause of action, then it is difficult to find those that are separate and independent. If A. should purchase goods of B., having a settlement monthly for the goods purchased during the month preceding, and at the end of a year B. should bring suit, he could unite the several amounts found due on settlement, because all arose out of contract, but each would have to be separately stated, because of being a cause of action by itself, in consequence of a settlement and separation from the rest of the account. Here the *law* settles and fixes the amount due for each quarter and does not allow it to become mingled with, or dependent upon, the taxes or proceedings of any other quarter. Every quarterly or yearly tax is an enforced contribution for the support of the state, and from its very nature must be a separate and independent liability. We now come to a consideration of the question whether a tax is a debt, or in the nature of a debt, and whether those due for different quarters can be collected in the same action. A conclusion in this case that a tax is in the nature of a debt could not help appellant, if it does not arise out of a contract, express or implied; and it may be conceded that, before the code, the action of debt was a proper remedy

for the collection of a tax, in case any action was allowed, and that several demands for debt could have been united.

“By the common law an action of debt is the general remedy for the recovery of all sums certain, whether the legal liability arise out of contract or be created by statute.” (*United States v. Lyman*, 1 Mason C. C. R. 498.) That was an action of debt to recover certain duties. It was held to be a proper remedy, not because the amount claimed was due under a contract, but because, under the law, it was for a certain, definite sum for which the defendant was liable. Bouvier says: “Debt lies for a sum of money certain, due by the defendant to the plaintiff, whether it has been rendered certain by contract between the parties or by judgment or by statute.” (3 Bouv. Inst. 627; see Bliss on Code Plead. sec. 243; *Meredith v. United States*, 13 Peters, 486, and *Portland D. D. Co. v. Trustees*, 12 B. Mon. 77.) It will be seen by reference to the authorities, however, that this class of cases does not strengthen appellant’s case. Although they decide that, under the common law and the old practice, the action of debt was a proper remedy for the collection of a tax or duty, in the absence of a special statute, still they do not decide that such an action was proper because a tax or duty is a debt arising out of a contract, express or implied, and that is the condition of unity under section 64.

In comparison with the number holding an opposite doctrine, there are very few authorities which declare a tax an obligation or debt based upon or arising out of an implied contract. (See *Dugan v. Ballimore*, 1 Gill and J. 499; *The City of Dubuque v. The Ill. Cent. R. R. Co.*, 39 Iowa, 60; *Mayor v. McKee*, 2 Yerg. 167; 3 Bl. Com. 158.)

Opinion by Beatty, J., 2 Nev. 61, with dissenting opinion by Brosnan, J., Lewis, C. J., not participating in the decision. (See repub. vols. 1, 2, Nev. R. 588.)

In the first of the above cases no reasons are given in support of the doctrine stated. In the second, Bouv. Dict., tit. Contract, Chitty’s Contracts, 2, and 3 Bl. Com. 158, are cited. Cole, J., dissents expressly.

And in relation to the reasoning of Mr. Blackstone, Jus-

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tice Story, in 1 Mason, 288, says that "it is very refined and ingenious in theory, but it never has to its full extent been admitted in practice, as the foundation of legal remedies." The case in 2 Yerg. declares upon the authority of Blackstone, that by becoming a member of society a person tacitly promises to pay any debt or tax legally imposed, and for non-payment is liable to a suit upon such implied promise. We do not subscribe to the doctrine of the above authorities. It was a convenient fiction in the beginning, and can never arise to the dignity of reality. The authorities are overwhelming in favor of the conclusion that taxes are not debts in the sense that they are obligations or liabilities arising out of contracts express or implied, and in the true and usual sense, are not debts at all; but that they are "the enforced proportional contribution of each citizen and of his estate, levied by the authority of the state for the support of government, and for all public needs; that they owe their existence to the action of the legislative power, and do not depend for their validity or enforcement upon the individual assent of the taxpayer, but operate in *invitum*." (Cooley on Tax, 13; Bliss on Code Plead. 128; *Johnson v. Howard*, 41 Vt. 125; 26 Id. 486; *City of Augusta v. North*, 57 Me. 394; *Geren v. Gruber*, 26 La. An. 697; *Loan Association v. Topeka*, 20 Wall. 664; *Pierce v. City of Boston*, 3 Met. 520; *Lane Co. v. Oregon*, 7 Wall. 78; *Perry v. Washburn* (wherein the court explains *People v. Seymour*, 16 Cal. 340); *Hanson v. Vernon*, 27 Iowa, 46; *Bradley v. McAtee*, 7 Bush. Ky. 673; *The City of Camden v. Allen*, 2 Dutcher, 398; *City of Carondelet v. Picot*, 38 Mo. 130; *Trenholm v. Charleston*, 3 Rich. S. C. 349; *Whiteaker v. Halcy*, 2 Oregon, 139; *De Pauw v. City of New Albany*, 22 Ind. 206; 53 Me. 591.)

We deem it unnecessary to notice other points raised by counsel.

The judgment is affirmed, each party to pay its own costs on appeal.

BEATTY, C. J., concurring and dissenting:

I concur in the judgment on the ground that the action was barred by the statute of limitations.

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I dissent from that part of the opinion of the court in which it is held that there was in this case a misjoinder of causes of action. If the principle of the decision upon that point affected only suits for taxes the matter would, perhaps, not be of sufficient consequence to justify any extended statement of the grounds of my dissent, for as long as the plain injunctions of the statute are obeyed there ought never to be more than one claim for delinquent taxes pending against the same person; and consequently it can not be presumed that the privilege of uniting two or more such claims in one action will ever hereafter be of any practical importance. But it will be seen from the reasoning of the court, and the authorities cited to sustain its conclusions, that the decision rests upon a principle that will include a great many other causes of action besides delinquent taxes, and that if it is consistently adhered to, the beneficent rule of the statute will be very greatly restricted in its operation. For in effect it is held that there is no implied contract to pay taxes *because, and only because, the obligation is imposed by statute, and does not depend for its validity upon the individual assent of the taxpayer*; because, in short, it is an obligation operating *in invitum*. Now, if this is a good reason for holding that there is no implied promise to pay a tax, it must equally follow that there is no implied promise to discharge any common law or statutory obligation which operates *in invitum*, and the result is that no two demands of that character can hereafter be united in the same action. This I regard as an extremely pernicious consequence, and therefore I shall endeavor to show that the doctrine from which it flows, although true to a certain extent, has no application to the construction of section 64 of the practice act. For this purpose I shall rely to a great extent upon the cases and writers whose authority is invoked by the court. In the first place, however, I wish to call attention to a principle of legal construction, which seems to have been to some extent overlooked: The office of interpretation is to determine the sense in which words have been used. The same word does not always mean the same thing. Not only are words employed in different

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senses in different statutes, but the instances are not rare in which a word has been held to mean one thing in one part and another thing in another part of the same statute. What is true of other words of ambiguous import is emphatically true of the word *contract*—a word that has been used by law-writers of the highest reputation and authority sometimes in a very enlarged, and at others in a much more restricted, sense. In order to determine its meaning in any particular statute in which it may be found, it will always be necessary to look to its context, to the subject-matter, and to the spirit and object of the law. To hold that, because in construing one statute it has been interpreted in its ordinary and more restricted sense, it must therefore be taken in the same sense in every other statute, is simply to ignore one of the most familiar rules of legal construction. Yet this, in my opinion, is the mistake into which the court has fallen.

No one will deny that it has been frequently held, and correctly held, that a tax is not a debt or obligation *ex contractu* in the ordinary sense of those terms, or within the meaning of such statutes as the legal tender act, and the statutes of limitations, set-off, etc., of some of the states. The question here, however, is not as to the ordinary sense of the word *contract*, standing by itself in an ordinary statute, but as to its technical sense, as a term of art, when combined in a technical phrase, in a statute relating exclusively to technical matters, and therefore necessarily the work of professional hands.

The civil practice act permits the joinder of causes of action arising out of contracts, express or implied. What did the lawyers who framed the code of practice mean by the expression "causes of action arising out of contracts, express or implied?" Can it be doubted that they intended it to embrace all those causes of action which at common law were held to arise out of implied contracts? I at least entertain no doubt, and the authorities cited by the court (Bliss and Pomeroy) admit that the language of the act is to be taken in its broadest technical sense. This conclusion, moreover, is fortified by the fact that every considera-

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tion of policy and convenience, as well as the whole spirit and object of the statute, favor such a construction.

The practice act is a remedial law. It was designed to simplify legal proceedings; to expedite them and render them less costly and burdensome to litigants. Many of its rules are borrowed from the practice in equity, and, in construing its provisions, courts have generally professed to be guided by the liberal and enlightened principles of equity, with a view to the promotion of justice, the discouragement of oppression and the prevention of needless expense and delay. For all these reasons, I not only feel authorized, I feel constrained, to give the largest and most liberal possible construction to the provision in question. For it can not be denied that the rule of equity and of sound policy is against the unnecessary multiplication of suits. When a number of demands of similar nature, involving similar principles and results, capable of being heard together without inconvenience, and open to the same defense, can all be embraced in the same judgment, they ought to be united in the same action, not only for the sake of the litigants, but also for the sake of the public. This is the doctrine of equity (Story's Eq. Pl., secs. 530-1-2), and this is the spirit of section 64 of the practice act, as is shown by the restrictive clause near the end, which prohibits the joinder of actions, unless they "all belong to only one of these classes and shall affect all the parties to the action, and not require different places of trial." This express limitation upon the right of uniting separate causes of action in the same suit proves that it was the intention of the framers of the law that, subject to its own positive restrictions, it should be largely and liberally construed. *Exceptio probat regulam.*

It is not denied—indeed, it is tacitly conceded, both in the argument of counsel and in the opinion of the court—that it would be better if the law allowed the joinder of the several causes of action set out in this complaint. The court decides, only because it feels compelled to decide, that a delinquent tax is not a "cause of action arising out of an implied contract." To this conclusion it is forced by

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what it deems the overwhelming weight of authority. I might feel similarly constrained if I found the long list of cases cited by the court to be strictly in point, and found nothing more on the other side than the two or three cases referred to in its opinion. But I think I may safely affirm that whoever will take the trouble to make a critical examination of the authorities relied on will find that a large number of them have a very remote, and some of them no bearing whatever on the question at issue. There are, however, quite a number of them, following the case of *Pierce v. Boston* (3 Met. 521), which hold that an obligation operating *in invitum* is not a contract *in the ordinary sense of the word*, and therefore (on the principle that words are presumed to be used in their ordinary sense unless there is something in the context or spirit and object of the law to prove the contrary) that taxes are not embraced by the words "contract" and "debt," as used in the legal tender act and in certain statutes of limitation, set-off, etc. I do not question the correctness of these decisions. They are, in fact, entirely consistent with the principle of interpretation which I invoke; for in every single instance in which a tax has been held not to be a debt or obligation *ex contractu*, the whole spirit and object and policy, and sometimes the express words, of the statute in question were opposed to an enlarged and liberal interpretation of the words. The fact, therefore, that an obligation imposed by law and operating *in invitum* is not a contract in the ordinary sense of the word was a perfectly valid ground for those decisions. But can it thence be inferred that such obligations were not held to be implied contracts at common law, and that they are not embraced in the provisions of section 64 of the practice act? This question is answered in the negative by the very authorities relied on by the court.

Bliss on Code Pleading, section 128, is cited. In that section the author is treating the identical question under consideration, and this is his language: "The permission is to unite actions upon contracts, express or implied. It is said that an implied agreement is but an obligation, created by law, warranted by justice, but not by the assent—and

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often against the assent—of those to be charged. So far as this is so, such obligations have no affinity with contracts and can not upon principle be classed with them. To call such an obligation a contract was always a fiction." This is the passage cited, and certainly it does show that the doctrine of implied contracts was always, to a great extent, based upon a legal fiction. But what if that legal fiction has been recognized and adopted by the statute as a means of definition, and as the basis of substantial rights? In that case it seems to me that, at least for the purpose of construing the statute, the "convenient fiction" so cavalierly treated in the opinion of the court does "rise to the dignity of reality." Now, what does Mr. Bliss say on this subject? I quote from the same section (128), a little lower down: "There were cases (at common law) in which assumpsit would lie where no promise, as a fact, could be implied; where the allegation of a promise was a naked fiction; where there was an obligation merely, and where, logically—if any logical deduction had governed the common law pleaders which did not spring from a fictitious premise—debt, or case, or trespass, should have been the form of action. I refer to legal obligations in respect to those through whom the debt accrued, and to obligations arising from injuries. Thus one might lay a promise from the husband or father to pay for necessities furnished to a wife or child, although furnished against his express command, and also lay a promise to pay for goods wrongfully converted by the defendant, although under a claim of ownership. *As the code expressly refers to implied contracts, these as well as those where the agreement is understood, will probably continue to be treated as agreements, and thus one of the most marked fictions of the common law pleading is perpetuated.*" From the last sentence in the above quotation (which I have italicized), it clearly appears that this author, although disposed to find fault with the "common law fiction" of implied contracts, is nevertheless convinced that within the meaning and for the purposes of section 64 of the practice act that fiction has been "*perpetuated.*" What rank Mr. Bliss is to take as an authority on code pleading is not yet deter-

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mined, and I have only been induced to quote his opinion at so much length because he is included in the list of authorities deemed "overwhelming" by the court. I have shown, I think, conclusively that upon the point at issue he ranges himself distinctly against the opinion of the court. So also does another text writer who is quoted at great length and highly commended by the court in connection with another branch of the case. (See Pomeroy's Remedies and Remedial Rights, sections 492, 493, and cases cited.)

Upon the opinion of these two writers, in the absence of any authority to the contrary, I am willing to rest the correctness of my conclusion, that the provisions of section 64 of the practice act embrace all causes of action arising out of implied contracts, in the widest sense of that expression as used by common law pleaders.

It remains only to be seen whether the obligation of the tax-payer was one of those upon which a promise was implied at common law. That it was, has been held, not only in the cases referred to by the court, but in other cases to which I shall call attention, and the contrary has never, to my knowledge, been decided in any case. It has been frequently decided, and such is probably the settled law, that where the statute provides another remedy a suit for taxes can not be maintained; but it has never been denied that, in the absence of any other remedy, *debt or assumpsit* would lie for the collection of delinquent taxes. None of the cases cited in the opinion of the court are opposed to this statement. The utmost extent to which they go is, I repeat, that a tax is not a debt or obligation *ex contractu*, in the ordinary sense of those terms, and therefore that taxes are not debts or contracts within the meaning of certain statutes whose spirit and object do not embrace them. I have not the slightest fault to find with this doctrine. I only object to its application to a case which depends upon a different principle; for it is constantly to be borne in mind that the *reason*, and the *only reason*, why in those cases it was held that a tax was not a debt, was that it is an obligation imposed by statute and operating *in invitum*. But I have shown that, in the opinion of Mr. Bliss and Mr.

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Pomeroy at least, section 64 of the practice act embraces obligations of that precise description. I shall endeavor, further, to show from numerous decided cases that at common law a promise to pay was always implied where the law, whether common or statute law, or the judgment of a court, imposed an obligation to pay.

Three cases (1 Gill and J. 499; 39 Iowa, 60, and 2 Yerg. 167) are referred to by the court as holding that from the obligation to pay a tax a promise to pay will be implied. We are left to infer that these are the only cases that sustain the doctrine, and an attempt is made to disparage their authority by pointing to the fact that they cite only Blackstone and Chitty, Jr., and that they assign no reasons for the doctrine stated. It is a mistake, however, to suppose that there are no other decisions to the same effect, and it is equally a mistake, in my opinion, to suppose that there is any real conflict between these decisions and the long list of cases cited in support of the conclusions of the court. If there were any such conflict it might be very pertinently remarked that even Blackstone and Chitty are better than no authority at all; and while it is true that they alone are cited in support of the doctrine stated in the three cases referred to, it is equally true that no decision and no writer is cited in support of the doctrine of *Pierce v. Boston*, and the other cases in which it has been followed. But in truth, there seems to have been very little need of citing authority in support of either set of decisions, one of which rests upon the admitted fact that the word "contract," in its ordinary sense, does not include involuntary obligations, and the other upon the well-understood maxim of the common law that, for the sake of affording a remedy, the law will always imply a promise from any legal obligation to pay. This principle is plainly stated in the case of *The Mayor of Baltimore v. Howard*, 6 Harris and Johns. 394, in which it was held that the action of assumpsit would lie for a delinquent tax. And in its practical form, I am not aware that the rule has ever been seriously questioned, although the explanation of its origin, or the ground upon which it rests, as given by Blackstone (3 Com. 158), has been un-

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favorably criticised. It makes no difference, however, what the origin of the maxim was; it concerns us only to ascertain its meaning and proper application. When we know what causes of action were held to arise out of contract before the code, we shall know what causes of action can be joined under the provisions of section 64.

What is said by Blackstone in relation to implied contracts, in the passage referred to, is as follows: "Of this nature are, first, such as are necessarily implied by the fundamental constitution of government, to which every man is a contracting party. And thus it is that every person is bound, and hath virtually agreed to pay such particular sums of money as are charged on him by the sentence or assessed by the interpretation of the law. For it is a part of the original contract entered into by all mankind who partake of the benefits of society, to submit in all points to the municipal constitutions and local ordinances of that state of which each individual is a member. Whatsoever, therefore, the laws order any one to pay, that becomes instantly a debt, which he hath beforehand contracted to discharge," etc.

This is the doctrine, if not the exact passage, commented upon by Mr. Justice Story in the language quoted by the court from the decision in *Bullard v. Bell*, 1 Mason, 288. By reference to that case it will be seen that Judge Story expressly admits that a "mere legal liability, created by statute," "may furnish the foundation or consideration of a contract, express or *implied*," although it "is not of itself a contract." All that he denies is so much of Mr. Blackstone's reasoning as holds that it is a contract in itself. He does not deny that the cause of action upon such an obligation is, in a technical sense, a cause of action arising out of contract. Moreover, the only reason given by Judge Story for dissenting from the doctrine as stated by Blackstone is an utterly inconclusive reason. He says: "If it were universally true, then *indebitatus assumpsit* would lie to recover a fine on a criminal sentence or a penalty or forfeiture upon a penal statute, which certainly can not be pretended." With all proper deference to the opinion of Judge Story

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(who, by the way, has been more than once repudiated by this court), I think a sufficient reason can be assigned why a fine or penalty or forfeiture was not recoverable in *assumpsit* without the slightest reference to the universality of the principle stated by Blackstone. The action of *assumpsit*, as is well known, lay only upon *parol* or *simple* contracts; it was not the remedy allowed for the recovery of any sum *due by specialty*. Therefore, when a sum certain was due by statute the action of debt only would lie, for the statute was deemed for that purpose a specialty. This precise point is decided by Judge Story himself in the case under consideration, and in fact the point upon which the decision turns is that a sum certain due by statute is a sum due by specialty. (1 Mason, 289.) The action of *debt* was as much an action *ex contractu* as the action of *assumpsit*; the only difference was that *debt* was in some respects a more extensive remedy than *assumpsit*. It would lie upon some contracts (specialties, including penal statutes), which would not support *assumpsit*. (1 Chitty's Pl. 121.) It is therefore a complete *non sequitur* to argue that because the action of *assumpsit* would not lie to recover a statutory penalty there was no implied contract to pay it. The fallacy of such a conclusion is demonstrated more completely by the fact that *assumpsit* would always lie to recover money due upon a statutory obligation in those cases where the statute could not be treated as a specialty (1 Chitty's Pl. 119); that is to say, in all cases where the amount to be recovered was unliquidated. For it is obvious that there is no principle upon which a promise to pay an uncertain amount can be implied which will not equally sustain the implication of a promise to pay a sum that is ascertained.

A great authority on common-law pleading has said "that all actions of debt whatsoever are founded upon a contract raised either in fact or by construction of law." This was an admission made against himself in arguing the case of *Hodsdon v. Harridge* (2 Saunders, 66) by Mr. (afterwards Chief Justice) Saunders. Considering his high reputation as a lawyer, and the authority of his reports upon questions of pleading, such an admission, re-

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ported by himself after his retirement from the bench, is, in my opinion, entitled to quite as much weight as a *dictum* of Judge Story.

But even admitting it to be true, for the sake of the argument, that it is only where the action of assumpsit will lie that a promise to pay is implied, "it is the general rule that, for money accruing, due under the provisions of a statute, the action of assumpsit may be supported unless some other remedy is expressly given." (See *Hillsborough County v. Londonderry*, 43 N. H. 453, and the long list of cases therein cited; see also *Bath v. Freeport*, 5 Mass. 325, and *Watson v. Cambridge*, 15 Id. 286.)

These were cases in which counties and towns were sued in assumpsit upon their statutory obligation to support paupers. In a case above cited (*Mayor of Baltimore v. Howard*, 6 Harris and Johns. 383) assumpsit was held to be the proper form of action for the recovery of a delinquent tax. In the case of *Rann v. Green* (Cowper, 474) Lord Mansfield held that the law raised an assumpsit upon the order of commissioners fixing the amount of tithes under a private act of parliament. That was an action for assumpsit for a sum *liquidated* by the order of the commissioners; in other words, it was a suit for a tax assessed upon the defendant by authority of law. In *Peck v. Wood* (5 Term R. 130) the defendant was sued in assumpsit upon his statutory obligation to contribute to the expense of a party wall, and the action was maintained. We have then, besides Blackstone and Chitty, jun., the authority of Chief Justices Saunders, Mansfield and Kenyon of the king's bench, and the supreme courts of Massachusetts, Vermont, New Hampshire, Maryland, Tennessee and Iowa for the proposition that the law raises an implied promise upon statutory obligations, and of Mr. Bliss and Mr. Pomeroy that such promises are embraced by section 64 of the code. On the other side there is nothing except the case of *Pierce v. Boston*, and like cases, in which it has been held that an obligation, imposed by statute and operating *in invitum*, is not a

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contract in the ordinary sense of the term. In my opinion there is no conflict between the two classes of decisions, and I am confirmed in this view by the fact that, in the same State (Massachusetts) in which a tax has been held not to be a contract within the meaning of the statute of set-off, because it is an obligation operating *in invitum*, it has also been held that assumpsit will lie upon the statutory obligation of a town to support its paupers, and no one has suggested that the two decisions are in conflict.

In conclusion, I think I may fairly claim to have proved that section 64 of the code was intended to embrace all cases in which a contract was implied prior to its enactment, and that a contract was implied upon all statutory obligations to pay money. That a tax is a statutory obligation has not only been decided, but it cannot be denied. Indeed, it is something more than a statutory obligation. The people, acting in their primary capacity, have put into the constitution a distinct acknowledgment of the inherent duty of every citizen to contribute to the support of the government in proportion to his means, and they have expressly delegated to the legislature the power to levy uniform taxes. The legislature, therefore, does not impose the duty. It is a duty recognized as existing antecedent to any legislation—a duty not created, but merely regulated by law. No possible distinction can be drawn between the duty to pay taxes and the statutory duty to support paupers, or the common-law duty to support wife and children, to pay tithes, or compensate the owner of goods wrongfully converted. As has been said by the most recent American writer on the law of taxation (Burroughs, 254), “a citizen enjoys the benefit of government, his person and his property are protected, and the expenses of the government are to be paid; will not the law in like manner raise an implied promise that the citizen shall pay his proportion of the expense? And when it is ascertained in the mode prescribed by law what amount he should pay, should there not be considered an implied promise that he will

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pay the amount? Taxes are a political necessity. If the law raises a promise to pay, that one of its citizens may not obtain the services or goods of another without compensation, surely it will raise it that the state may exist."

Upon these grounds I dissent from the conclusion that there was a misjoinder of causes of action.

[No. 822.]

S. BUCKLEY, APPELLANT, v. ARMENIA BUCKLEY,
ADMINISTRATRIX, ETC., RESPONDENT.

CROSS-EXAMINATION OF WITNESS.—The testimony of a witness upon cross-examination should be confined to matters testified to upon his examination in chief.

PETITION for rehearing.

This case is reported in 12 Nev. 424.

Lewis & Deal, W. Webster & W. L. Knox, for Appellant.

W. Cain, for Respondent.

Response to petition for rehearing.

By the Court, LEONARD, J.:

After a careful re-examination of this case, we are satisfied that appellant is entitled to a new trial, and particularly on account of one error in the court below, to wit: In allowing witness Short on cross-examination by respondent, to testify that H. A. Buckley told him that he (Henry) had traded his sheep in California for his father's sheep in this state. It was in no sense proper cross-examination, and it was certainly injurious to appellant's case.

And although we are unable to *perceive* how the error in permitting Irwin J. Buckley to answer on cross-examination as to the value of the sheep left behind at the "boneyard" was *injurious*, still it was error.

The petition for a modification of the judgment, and an affirmance as modified, must be and is denied.

[No. 941.]

MICHAEL HARRISON, RESPONDENT, v. WILLIAM H. LOCKWOOD, APPELLANT.

STATEMENT MUST BE FILED IN TIME.—A statement on motion for new trial which was not filed within the time allowed by law should, on motion, be stricken out. (*Williams v. Rice*, 13 Nev. 235, affirmed.)

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The facts are stated in the opinion.

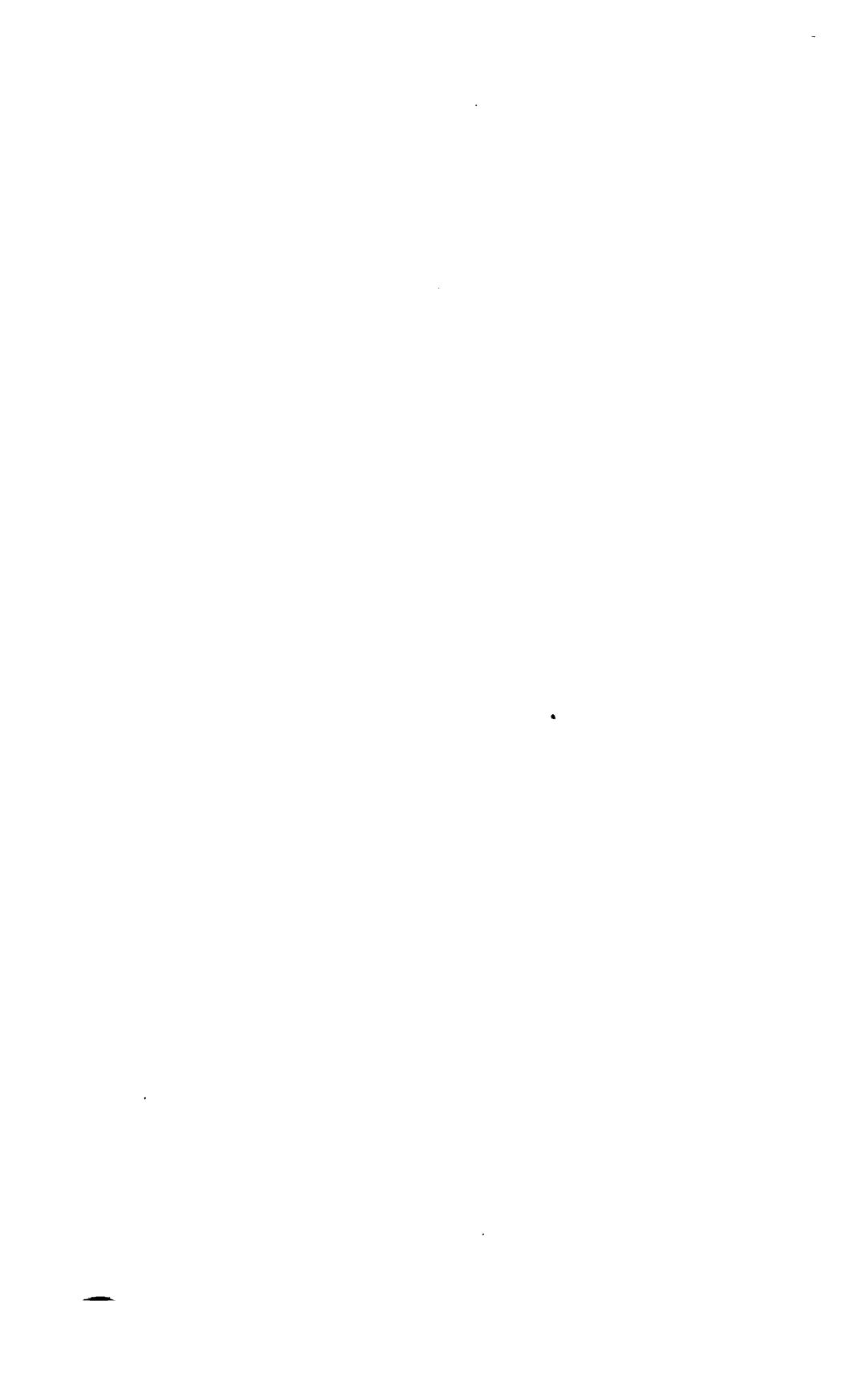
John T. Baker, for Appellant.

C. J. Lansing and D. E. Baily, for Respondent.

By the Court, LEONARD, J.:

This was an action upon a promissory note, and James Reilley, Thomas Reilley, and William H. Lockwood, partners, under the firm name of Reilley & Lockwood, were made defendants. Judgment was rendered against Thomas Reilley and Lockwood on the eighteenth of July, 1878, for one thousand six hundred and twenty-five dollars and fifty-seven cents, besides interest and costs. On the twenty-fifth of July, 1878, appellant alone filed a notice of motion for a new trial, and on August 31, 1878, he filed a statement on motion for a new trial. The motion was denied August 31, 1878. Defendant Lockwood alone appeals from the judgment only. There is no statement on appeal, and the statement on motion for a new trial was filed long after the time allowed by law therefor, and long subsequent to the time given for filing a statement on appeal. Respondent moves to strike out the statement on motion for a new trial, and on the authority of *Williams v. Rice et al.*, 13 Nev. 235, the motion must prevail. There is then nothing left for us to consider but the judgment roll. In that no error appears and none is claimed. The judgment of the court below is affirmed.

14	263
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14*	587



REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF NEVADA.
JULY TERM, 1879.

[No. 898.]

E. S. DAVIS, RECEIVER OF THE FIRST NATIONAL
BANK, APPELLANT, v. LEWIS COOK ET AL., RE-
SPONDENTS.

PARTNERSHIP—PROMISSORY NOTES—PRESUMPTION.—Where the notes are given in the firm name the legal presumption is, that they were executed for a partnership purpose, and the burden of proof is upon defendants to establish the contrary.

IDEM—POSSESSION OF PERSONAL PROPERTY—VERITY OF DEED—INSTRUCTION.—The following instruction, viz: "Possession of personal property is *prima facie* evidence of ownership, and a deed on its face imports verity, and no subsequent change of possession shows, or tends to show, that a party in possession first was not the owner at that time:" *Held*, erroneous.

REAL ESTATE—PURCHASE OF BY ONE PARTNER.—The purchase of real estate may or may not be within the scope of the partnership business.

IDEM—SCOPE OF PARTNERSHIP BUSINESS.—Lewis, John A. and Isaac Cook were co-partners engaged in the business of general merchandising, under the firm name of "Cook Bros." Lewis, was the resident partner. John A. and Isaac were non-residents. Lewis Cook purchased a stone storehouse and a lot of stationery, in his individual name, and in payment therefor gave the notes, sued upon in this action, in the firm name: *Held*, in reviewing all the testimony, that Lewis Cook in making this purchase acted within the scope of the partnership business, and that the knowledge of such purchase was not sufficient to put the plaintiff upon inquiry as to the consent of the other partners.

ASSUMPTION OF FACTS NOT PROVEN.—A question which assumes a fact not proven in the case ought not to be asked.

Statement of Facts.

APPEAL from the District Court of the Ninth Judicial District, Elko County.

The question referred to in the fifth assignment mentioned in the opinion as immaterial, propounded to John A. Cook, was as follows: Question—"Prior to July, 1869, did you ever have any knowledge or ever consent to the establishment of any business at Hamilton, by Cook Bros., or Lewis Cook, in the firm name?"

The question propounded to J. Barnett, and referred to in the opinion as the ninth assignment, was as follows: Question—"At the time John A. Cook settled Cook Bros. indebtedness with the First National Bank, at Hamilton, Nevada, who had the immediate control and supervision of that business for E. S. Davis, Receiver of the First National Bank?"

The following are the instructions referred to in the opinion of the court.

Instruction number seven asked by the plaintiff and refused:

"The plaintiff asks the court to instruct the jury, that Harker at the time these notes were given had the right to presume that the business of Cook Bros., at Hamilton, had been established, if at all, by the firm, and that unless he knew that it had not been, or had notice sufficient to put him upon inquiry that it had not been so established, then the right of the plaintiff to recover is not affected by the question as to whether Lewis Cook opened business in Hamilton with or without the consent of his partners."

The ninth instruction asked by plaintiff and refused:

"The jury are instructed that if they believe from the evidence that Lewis Cook opened a store in Hamilton, Nevada, under the firm name of Cook Bros., and that the other members of the firm were apprised of the fact, and never objected thereto, then in contemplation of law this was an adoption and ratification by John A. and Isaac Cook, and they cannot now be heard to say that such business was carried on without their consent or authority."

The second instruction asked by defendant and given by

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the court reads as follows: "You are instructed that if the transaction which was the consideration of the notes sued upon was outside of the business of the firm of Cook Bros., then the bank was not entitled to actual notice that the transaction was in the name of and for the individual benefit of Lewis Cook."

The other facts are set out at length in the opinion.

Kenney & Rand, for Appellant.

I. The court erred in overruling the objections to the question propounded John A. Cook, mentioned in the fifth assignment. The testimony was irrelevant.

The law presumes that when one member of a mercantile firm gives the notes of the firm, he is acting for the firm, and within the scope of the partnership business. (1 Parsons on Notes and Bills, 123, 128; Story on Prom. Notes, sec. 92; 18 Am. Rep. 192; 11 Mich. 525.)

Not having pleaded the want of authority they should not have been permitted to prove it. (10 Cal. 331; 39 Id. 532; 29 Barb. 170; 1 Greenl. on Ev., sec. 448.)

The presumption of law being admitted, so far as this case is concerned, he had the authority. (1 Parsons on N. & B. 123; 11 Nev. 200; 5 Cowen, 688.)

There was no offer to prove that the bank had any knowledge of the want of authority, and the law presumes that he had such authority. When a party offers to prove a fact, which standing by itself is irrelevant, and it is objected to as irrelevant, the party offering such proof should undertake to show such facts as would make it relevant, otherwise the proof should be rejected. (12 Cal. 426; 1 Greenl. on Ev., sec. 51.)

II. There was no evidence to identify the deed offered in evidence with the property purchased in the transaction in which these notes were given, and none that the bank had any knowledge that the deed was made to Lewis Cook alone. The record of the deed was not notice to the bank. (6 Cal. 720; 20 Id. 515.)

III. The receiver's powers were of a restricted and limited character. He could not admit away the rights of the

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creditors. (Morse on Banking, 516, sec. 50; General Banking Laws of the United States, approved June 3, 1864; Puley on Agency, 174-75-76, and notes thereto; Story on Agency, secs. 13 and 14; 26 Wend. 485.)

IV. There was a material fact assumed in the ninth assignment of which there was no proof, and no offers to prove. It was an attempt to controvert by evidence facts admitted in the answers. (1 Greenl. on Ev. 434; 10 Md. 76; 1 Whart. on Ev. 504; 20 Ill. 170; 27 Cal. 418.)

Davis could not ratify the acts of McCornick in attempting to defraud the creditors of the bank, and even if he could, he should have had something more than an opportunity of knowing what was done. He should have had actual notice of what was done.

The fourteenth assignment was clearly error. Hilp had been examined in chief as to the same subject-matter, and the plaintiff had a right to cross-examine him in relation to everything to which he had been examined in chief. (1 Wharton on Ev. 530; 7 Nev. 385.)

V. Plaintiff had a right to show that the merchandise, which was a part of the consideration for which these notes were executed, was appropriated and used by the firm of Cook Bros., with the knowledge and consent of the other members of the firm, and also to show a ratification of the purchase of the goods. (12 Pick. 430; 31 Mich. 373.)

The plaintiff had a right to show that the building, which was a part of the consideration for which the notes were given, was used by the firm for partnership purposes with the knowledge and consent of John A. and Isaac Cook. (Pars. on Partner. 376-77-78-79; 1 Pars. on N. & B. 124; 14 Wendell, 133; 1 Sumner, 183.)

VI. The court erred in refusing the seventh instruction asked by plaintiff. Lewis Cook told Harker that the firm had opened business in Hamilton, and the partnership is admitted. (Pars. on Part. 20, 180-197; note top 209; 2 Pars. on N. & B. 481; Story on Part. sec. 108-109; 6 Allen, 317.)

The court erred in refusing the ninth instruction asked by the plaintiff. There was ample evidence to sustain the in-

Argument for Respondents.

struction or to entitle the jury to pass upon it. (Story on Agency, secs. 253, 256, 258.)

VII. The court erred in giving the first instruction asked by defendant. It ignores the fact that it was just as necessary that the bank should have notice or sufficient reason to suppose to put it upon inquiry, that Lewis Cook was acting outside of the business of the copartnership as that he should be so acting. (1 Pars. on N. & B. top 128, 132, 133; 16 Wend. 505; 11 Johns. 544; 2 Pa. 160; 5 Blackf. 210; 20 How. U. S. Sup. Ct. 343.)

A *bona fide* holder of commercial paper is the person who owns the paper and has taken it in good faith for a valuable consideration.

He may be the payee, the indorsee or the bearer. (Story on Prom. Notes, secs. 195, 196; Pars. on N. & B. 253, 254.)

When errors are committed the law presumes injury. (39 Cal. 609; 42 Id. 402.)

VIII. The deed from Ivers to Lewis Cook is only *prima facie* evidence that the bank had any knowledge that it was given to Lewis Cook individually. (Pars. on Part. 376-77-79; note to 378; 5 Metcalf, 582; 9 Cal. 639; 9 Nev. 134, 1 Sumner, 182.)

IX. The acts of Lewis Cook were but the reasonable acts of the managing partner of a mercantile firm in this state. (Story on Part. note to top p. 244; Pars. on N. & B. 123; 12 Pick. 545; 44 N. Y. 514; 44 Id. 680; 9 Wall. 546; 20 How. 343; 6 Allen, 317; 17 Wend. 47; 5 Id. 223.)

A. M. Hillhouse, for Respondents.

I. The fact that the notes were given in lieu of indebtedness of Brachman & Ivers to the bank, shows that the transaction was simply that of a partner *assuming* an indebtedness of others for his firm.

This was not within the power of a partner.

U. S. Digest, N. S., vol. 9, p. 841, secs. 530-1-2-3, and authorities there cited.

II. Harker, the president of the bank, knew Lewis Cook was purchasing real estate and an entire stock of books, stationery, etc., both of which were outside of the business

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of "general merchandise." (6 Moak's notes Eng. Rep. 292; 43 Cal.)

III. A third party dealing with a partner must—when he knows the character of the transaction—know at his peril whether the business is within the legitimate scope of partnership business. (8 Ves. 540; 4 Johns. 266; 6 Id. 38; 19 Id. 156.)

A partner cannot establish a new firm or new business. (20 Ind. 110; 7 Barb. 150; 18 Wend. 477; 14 Id. 141; 3 Id. 415; 10 Id. 461.)

The business in which a partnership note is given must be within the scope of the partnership. (12 Gray, 453; 13 Id. 467; Story on Part. 132, 133; Collyer on Part. p. 188, sec. 139, p. 475 *et seq.*; Story on Ag., secs. 125, 137; 1 Am. Rep. 440; 8 Id. 576; 9 U. S. Dig. 439, 493.)

IV. Plaintiff stood in chief upon original authority and anticipated defendants' case. Defendants only controverted that. No proof of ratification was proper in rebuttal. (4 Gray's Mass. 215; 2 Id. 282; 6 Id. 507.)

There can be no ratification without full knowledge of all the material facts in relation to the act sought to be enforced. (3 Johns. Ch. 188; Storey's Agency, sec. 239, p. 298; *Adams Express Co. v. Trego*, 35 Md. 47; 12 Allen Mass. 493; 5 Nev. 224.)

V. Under all the evidence in the case the verdict and judgment are so manifestly correct that, even if there were some errors, the order and judgment appealed from should be affirmed. (See *Graham and Waterman on New Trials*, vol. 3, pp. 817, 864–868, and authorities there cited.)

By the Court, LEONARD, J.:

There have been several trials, and one appeal, of this case, before the present one. (9 Nev. 134.) At the last trial defendants recovered judgment for their costs. Plaintiff's motion for a new trial was denied, and this appeal is taken from the order overruling that motion. The notes sued on were dated at Hamilton, Nevada—the first, June 23, 1869, the second, June 30, 1869, and were signed "Cook Bros." Defendant Lewis Cook was not served with summons, and

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in no manner appears or answers. John A. and Isaac appear and answer for themselves alone.

It is alleged in the complaint, and is not denied in the answer, that the three defendants, at the time the notes were made, were partners doing business under the firm-name and style of "Cook Bros."

It is also alleged that on the days above stated, defendants, for value, made and delivered said notes to the First National Bank of Nevada; that no part of the same has been paid, and that plaintiff, as the duly appointed and authorized receiver of said bank, is the lawful holder and owner thereof. Defendants John A. and Isaac do not allege want of authority in Lewis to execute the notes in the name of the firm as he did; nor is there any denial that the bank gave a valuable consideration therefor. There is no denial that the defendants executed them in the firm name, except by an allegation that they were given for the individual indebtedness of Lewis, for goods and real estate purchased by him of Bruckman & Ivers and W. D. Ivers, for his individual use and benefit, and not for the firm, with knowledge of such facts on the part of the bank, through its officers and agents, who colluded and conspired with Lewis to defraud the other defendants, and that the firm received no part of the consideration of the notes. Defendants John A. and Isaac also allege that at the time of the purchase of said property of Bruckman & Ivers and W. D. Ivers, the latter were indebted to the bank to the extent of the notes in question, and that in part payment of the purchase money Lewis assumed their indebtedness to the bank, and the bank took Lewis therefor; that afterwards, at the date of the notes, with intent to defraud the defendants answering, and with knowledge of the facts stated, the bank made out, and Lewis signed, the notes set out in the complaint, as the notes of Cook Bros., when in truth the firm had no interest whatever in the consideration of said notes, as the bank well knew. They further allege settlement and payment by them of all notes and accounts due from the firm to the bank before the commencement of this action; that in the month of —, 1870, Lewis paid the notes

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set out in the complaint to W. S. McCornick, deputy receiver, who, well knowing the facts before stated, and with intent to defraud the defendants answering, as deputy receiver, took back said notes from Lewis, and for the bank claimed and claims to hold the same against Cook Bros.

The evidence shows that Cook Bros. commenced business in Austin in 1864; that Lewis was admitted into the firm as a partner in July, 1866, from which time until May, 1870, the firm carried on the business of general merchandising; that John A. and Isaac were generally absent from the state, and Lewis was the resident managing partner. The First National Bank of Nevada was established in Austin in 1864 or 1865, and subsequently, but before the dates of the notes in question, a branch bank was established in Hamilton. Some time about June 22, 1869, Lewis purchased of W. D. Ivers, above named, a town lot in Hamilton, with a two-story stone storehouse thereon; also, another lot, with building thereon, used as a lodging-house; also, a lot with stone saloon thereon, used as a brewery. The deed conveying the real property was executed in the name of Lewis Cook alone, and the consideration named in the deed was five thousand dollars. At the same time, and probably as a part of the same transaction, he purchased of Bruckman & Ivers a stock of goods consisting of stationery. It does not appear what the exact purchase price of the whole property was, except to the extent of the indebtedness of Bruckman & Ivers, the amount of the larger note (five thousand and eighty-seven dollars and forty-seven cents), and the indebtedness of W. D. Ivers, the amount of the smaller note (one thousand five hundred dollars), for the satisfaction and payment of which the notes in suit were given. The only evidence showing the nature of the transaction, so far as the bank is concerned, outside of the notes themselves, is the testimony of J. W. Harker, who testified as follows:

“I wrote those notes. They were signed by Cook Bros., and delivered to the bank at the time they bear date. I did not know Lewis Cook individually in the matter. The transaction was this: The bank held the notes and

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overdrafts of Bruckman & Ivers, and a note of W. D. Ivers, indorsed by Withington. The notes and overdrafts of Bruckman & Ivers were the amount of the larger note, and the note of Ivers was the amount of the smaller note sued on in this action. In June, 1869, I went to Hamilton to try to settle the matter up. I met Lewis Cook at Hamilton. He told me that Cook Bros had started business in Hamilton. He made arrangements with, and bought of, Bruckman & Ivers and W. D. Ivers, a stone storehouse and a lot of merchandise, for Cook Bros., and in payment of this property gave the notes sued on in this action, to the bank, and the bank gave up and canceled the notes and overdrafts of Bruckman & Ivers, and the note of W. D. Ivers. The consideration for the notes to Cook Bros. was the stone storehouse and a lot of merchandise that they received from Bruckman & Ivers."

On cross-examination he said: "Cook Bros. had a lot of goods in Hamilton, and more on the way from Austin, when these notes were given. * * * Cook Bros. did business with the bank constantly, almost every day. They drew overdrafts and gave notes. Lewis Cook was in Hamilton, off and on, about two months. I think Cook Bros. were about starting business in Hamilton in April, 1869. I will swear that I think they were. The two notes were a part of the same transaction. They were negotiated at the same time. Bruckman & Ivers and W. D. Ivers were the parties whose notes were given up. I knew that Bruckman & Ivers were selling real estate. Cook Bros. commenced doing business with the bank in 1866, and did business with the bank almost every day, up to the time these notes were given. The business Cook Bros. did with the bank was to borrow money on notes and overdrafts. The bank extended to them the same accommodations it did to other merchants in good standing. The notes were signed by Lewis Cook for Cook Bros. I knew that they were rich, and I was satisfied. I conducted the entire transaction on the part of the bank. W. D. Ivers did not tell me he had sold the property to Lewis Cook. He told me that he had made arrangements with

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him to settle with the bank, but I understood that the trade was made for Cook Bros. I never knew that there was any real estate sold in this transaction except the stone store."

On re-direct examination he stated that "all the time Cook Bros. had been dealing with the bank, Lewis Cook was the managing partner in the firm of Cook Bros. in this state, and transacted all the business of the firm with the bank. He gave the notes of the firm a great many times, and they had always been paid by the firm; and up to the time of the execution and delivery of the notes sued on in this action Cook Bros. paid all the liabilities to the bank incurred by Lewis Cook in the name of the firm."

In rebuttal, the same witness testified that prior to the delivery of these notes he did not know that the real estate was deeded to Lewis Cook.

There is no evidence in the case showing, or tending to show, that Lewis purchased the property mentioned for his own use and benefit, and not for the firm, except that the deed conveying the real estate was taken in the name of Lewis alone, as above stated, and that he took possession of the personal property.

There is no proof that Harker knew or had reason to think the property was purchased for the use and benefit of Lewis and not for the firm, or that the firm did not receive the consideration given for the notes, unless it be true that the purchase of the store and the goods was so entirely outside of the scope of the partnership business of the firm, that he was thereby bound in law to know the fact that Lewis had authority from his partners before receiving the notes, and, failing to do so, that the law holds him and the bank guilty with Lewis of constructive fraud.

There is no testimony tending to show actual fraud on the part of Harker, nor is such fraud claimed by counsel for defendants. Nor is there any proof that, as between the partners themselves, Lewis did in fact exceed his authority in purchasing the property; or that Harker knew, or had any notice, that the deed was taken in the name of Lewis; or that the goods were stored in his name, either before or after the delivery of the notes, if such was the case.

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Ballenberg testified that in the last part of June, 1869, certain goods, principally stationery, were stored in Ottenheimer's warehouse in Hamilton, in the name of Lewis Cook, as the books showed. He was not sure whether they were withdrawn by Lewis or by Cook Bros. It was not shown that the stationery so stored was that which was bought of Bruckman & Ivers, but we shall treat it as the same, and consequently that Lewis took possession of the goods.

What Harker did know, or had reason to know, in relation to the transaction between Lewis and Bruckman & Ivers and W. D. Ivers, at the time he received the notes, and, as he states, after Lewis had told him that Cook Bros. had started business in Hamilton, is that Lewis had bought the stone store and merchandise—the stationery—for Cook Bros. So far as is shown, that was the limit of his information.

Plaintiff offered to prove, as we shall see, what became of the goods, and by whom the store was occupied after its purchase, but such proof was rejected.

Counsel for defendants states his theory of this case as follows: "Upon these pleadings, what issues are made? We urged that these notes were given for Lewis Cook's individual indebtedness. To prove that, we show all the real estate to have been taken in his name, and the personal property in his possession. We claim, also, a fraud upon the part of Lewis Cook and the bank, upon John A. and Isaac Cook. To prove this we show, and the plaintiff also proved, that this transaction was outside of the legitimate business of Cook Bros., and that the bank had actual knowledge. Next, Lewis Cook, as a partner, being only the agent of the firm, within the legitimate scope of the firm's business, that, as in all other cases of agency, the person dealing with such agent must, at his peril, know his authority; that taking firm notes from one partner in a transaction outside of the partnership business is a fraud upon the other partner." Briefly stated, then, the position of counsel for defendants is this: Lewis gave the firm notes, as he had the authority to do, if the transaction—the purchase—was within the scope of the partnership business. But, says

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counsel, in this case, the transaction must be considered as having been made for the individual use and benefit of Lewis, and not for the firm, because the deed was taken in his name, and the personal property was taken possession of by him; and the bank having had notice of the above facts (for the reason that the purchase was outside of the scope of the partnership business, of which fact the bank had actual knowledge), therefore, the taking of the firm notes was a fraud upon the other partners, and the bank was, constructively, a party to the fraud, and plaintiff can not recover.

We shall examine these two propositions in the order stated.

This case must be considered as though it had been admitted that Lewis commenced business for the firm, in Hamilton, by and with the previous consent of the other partners. If the latter had not consented to the opening of their house, at the time the notes were given, they certainly did consent within a few days thereafter. So far as the record shows, and from their own testimony, after July 1, 1869, and after they knew that Lewis had commenced business in the firm name, their acts were a constant acknowledgment and proclaiming to the world that Cook Bros. had opened a store in Hamilton. Nor does it matter if, at the dates of the notes, the store had not been actually opened. It is true that, in a proceeding outside of the scope of the business, John A. and Isaac cannot be held to have ratified the unauthorized acts of Lewis, without proof that they knew all the material facts at the time; but here the material fact was that the business which had been carried on by the firm in Austin, and was afterwards conducted in Hamilton in the firm name, had been established by Lewis at the last-named place, or was about to be established, at the time the notes were given. That fact they knew as early as July first, and by ratifying the establishment of their business, the firm thereby became liable for all acts of Lewis properly within the scope of the business so established. (*Burnley v. Rice*, 18 Tex. 495.) The case is the same as though Lewis had gone to Hamilton by and

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with the knowledge and consent of his partners, with power to open a store and carry on their business at that place. "Such adoptive authority relates back to the time of the original transaction, and is deemed, in law, the same to all purposes as if it had been given before." *The London Savings Fund Society v. The Hagerstown Savings Bank*, 36 Pa. St. 503.)

The notes having been given in the firm name, the legal presumption is, that they were executed for a partnership purpose, and that the firm is bound by them, and the burden of proof is upon defendants to establish the contrary. (1 Pars. Notes and Bills, 128; *Carrier v. Cameron*, 31 Mich. 377; *Gunsevoort v. Williams*, 14 Wend. 138; *Whitaker v. Brown*, 16 Wend. 511; *National Union Bank etc. v. Landon*, 66 Barb. 190; *Burgess v. Northern Bank of Kentucky*, 4 Bush, 600; *Hamilton v. Summers*, 12 B. Mon. Law and Eq. 11.)

When it appears upon the face of a bill or note that it is given in discharge of a separate debt, or in a transaction unconnected with the partnership business, or if it is admitted by the holder that such was the nature of the transaction and he knew it at the time it was taken, then in order to recover against the firm he must show facts other than that it is partnership paper. He must then show the consent of the other partners. But in other cases the burden is upon the defendant to remove the presumption above stated, as well as the additional fact that the holder knew the money was borrowed for the individual use of the partner borrowing, or in a transaction unconnected with the business of the partnership. (*Whitaker v. Brown, supra*, 511; *Gunsevoort v. Williams, supra*, 138.)

It is said by counsel for defendants, however, that the evidence of both parties removes these presumptions, inasmuch as it shows that the purchase was not within the scope of the partnership, and that Harker had knowledge of that fact; that the burden was therefore upon plaintiff to prove the consent of John A. and Isaac, which he has failed to do. For the purposes of the argument, we shall concede, without deciding the question, that Harker was bound to know that the purchase was without the scope of the busi-

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ness of the firm, if so it was; and for the same purpose, without deciding it, that plaintiff's rights are the same as they would have been if the bank had sold the store and goods to Lewis and taken the notes in question therefor, the latter having had authority to commence and carry on the business of general merchandising in Hamilton. We shall not consider the fact that Lewis purchased any real estate besides the store, because there is no proof that Harker knew or had reason to think that the balance described in the deed was included in the purchase. (*Knapp v. McBride*, 7 Ala. N. S. 26, 27, 28, and the two cases last cited.)

Do the facts, then, that the deed to the store was taken in the name of Lewis Cook, and the possession of the goods taken by him after purchase, prove *per se* that the purchase was made for his use and benefit alone, and not for the firm, and consequently that the firm notes were executed for his separate indebtedness? Whether Lewis made the purchase on his own account or for the firm; whether the property was appropriated to the use of Lewis or to the firm, and whether Harker or the bank had knowledge that the transaction was for the benefit of Lewis alone, were undoubtedly questions for the jury to consider. (*Woodward v. Winship*, 12 Pick. 433; *Goodman v. Simonds*, 20 How. U. S. 343; *Lea v. Guice*, 13 Smedes and M. 671; *Judson v. Gibbons*, 5 Wend. 224.) But it was necessary that they should decide such questions, like all others, under proper instructions and upon proper evidence; and it may be added that it was a matter of no consequence to prove that the purchase was made by Lewis for his use and benefit, without further proof that Harker or the bank had knowledge of that fact, or of circumstances sufficient to put the bank upon inquiry. Several assignments of error may be considered in this connection.

The jury were instructed as follows at the request of the defendants: "Possession of personal property is *prima facie* evidence of ownership, and a deed on its face imports verity, and no subsequent change of possession shows, or tends to show, that a party in possession first,

was not the owner at that time;" and the court refused to permit plaintiff to prove that about the time the notes were given, Cook Bros. opened a store in Hamilton, in the stone building bought of Ivers, which was a part of the consideration of the notes, and continued to transact business in said building under the firm name until May, 1870; that the stationery purchased of Bruckman & Ivers went into the firm's stock of general merchandise when they opened their said store; that they there dealt in stationery; all of which was done with the knowledge and consent of the defendants John A. and Isaac; and that for a large portion of the time John A. was present, assisting Lewis in conducting and controlling the business of the firm. It is claimed by counsel for defendants, that the instruction above quoted is sound law in this case, and therefore that the rejected evidence was immaterial; also, that it was not legitimate rebuttal. We think counsel is in error. At the trial plaintiff first introduced the notes in evidence, which established a *prima facie* case against defendants, and in addition proved by Harker what the consideration was, what Lewis told witness about Cook Bros. having commenced business in Hamilton, and that the giving of the notes was a transaction of the firm, so far as he was concerned, and not an individual affair of Lewis. On cross-examination witness stated that Ivers did not tell him that he had sold the property to Lewis, but did tell him that he had made arrangements with Lewis to settle with the bank, and that witness understood the trade was made for Cook Bros. When plaintiff rested, defendants introduced the deed from Ivers to Lewis, and evidence tending to show that Lewis took possession of the personal property purchased, and that he stored it in his own name, for the purpose of proving that the property was sold to Lewis and not to the firm. Plaintiff then endeavored in rebuttal to prove the facts above stated, which were rejected. In opening his case, plaintiff did not show that the purchase was made by Lewis for his individual use and benefit. All that was said by Harker touching that point was stated in cross-examination, and that was merely the understanding of

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the witness. He testified to no fact upon which his understanding was based, tending to show that such was the nature of the purchase. The deed, unexplained, did tend to show what defendants claimed for it, and plaintiff had the right to prove facts in rebuttal of the ostensible object and effect of the deed. He had a right to show that although the deed was taken in the name of Lewis, still he held the legal title for the firm, and took possession of the personal property for the firm, just as in proper cases it may be shown that a deed, absolute upon its face, was, and is, in fact, a mortgage. But counsel says: "The title to all the real estate was shown to have been in the name of Lewis, and the possession of the goods in him. Apply the rule of law in this instruction, quoted above, and what became of the goods or who occupied these premises becomes entirely immaterial."

The court evidently took the same view.

Under the facts and pleadings of this case the instruction in question was not law. Let it be borne in mind that one of the principal issues made was, that Lewis bought the property for his individual use and benefit and not for the firm. If that fact had been admitted by the plaintiff, the instruction would have been correct. But we must remember that plaintiff contended that the purchase was made for the firm.

It is said in *Pars. on Merc. Law*, 180: "If goods are bought by one partner, and they are immediately used as the property of the firm, there would be a presumption that they were bought by him as a partner and for the firm." (See also *Lindley on Partnership*, 268.) Here the offered proof would have brought the case fully within the doctrine laid down above. It was a circumstance for the jury to consider in deciding one of the main questions made by defendants, and in deciding that, they should have been permitted to say why Lewis put the goods purchased with the general merchandise of the firm, and sold them as a part of the firm stock, if such were the facts, with the knowledge and consent of his partners. The jury should have said whether or not such acts on the part of all the

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partners were consistent with the idea that Lewis purchased the goods for himself, and that the firm so regarded the purchase. (See *Bracken v. March*, 4 Mo. 76; *Lindley on Part.* 268.)

What has been said in relation to the goods is equally true of the store. If that was used for the business of the firm from July, 1869, until May, 1870, with the knowledge and consent of all the members of the firm, that fact, too, was a matter for the consideration of the jury. They might have considered it a circumstance of great significance, particularly in the absence of any evidence that the firm paid Lewis rent for its use, and that the goods and store were not treated as firm property at the time of dissolution. (*Reynolds v. Swain*, 7 La. (N. S.) 127; *Dewey v. Dewey*, 35 Vt. 556.)

If Lewis had paid out the firm's money for the property instead of giving its notes, taken possession of the goods and received the deed in his own name, I presume, in a contest between his creditors and the creditors of the firm, it would not have been claimed that an appropriation of the property to the use and benefit of the firm was not an important fact to be considered by the jury in determining for whom the purchase was made. The rejected evidence was equally important in this case.

Besides, if Lewis had authority to purchase the goods and thereby bind the firm, and did purchase them for the partnership, possession by him was possession by all. And if the purchase of the store was within the scope of the partnership business, and was in fact purchased for the firm and appropriated to its uses, it was a matter of no moment that the deed was taken in the name of Lewis alone. (Pars. on Part. 364 *et seq.*; *Hunt v. Benson*, 2 Humph. 460; *Hoxie v. Carr*, 1 Sumner, 180; *Dyer v. Clark*, 5 Met. 581; *Moderwell v. Mullison*, 21 Pa. St. 259; *Hogle v. Lowe*, 12 Nev. 295.)

The court erred in giving the instruction just considered, and in rejecting the offered evidence.

But it is urged that the purchase of both the store and the goods was beyond the scope of the partnership busi-

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ness, and, consequently, that Lewis had no implied authority to bind his partners thereby; that knowledge of such purchase was sufficient to put Harker upon inquiry as to the actual authority of Lewis, and that failing to prove authority outside and beyond the fact that, as partner, he made the purchase and gave the partnership notes in payment, plaintiff cannot recover. The most important questions in the case are here presented: Are the undisputed facts legally sufficient to sustain the position of counsel and support the verdict in this respect? In the consideration of these questions, we must again keep in mind, first, that the business of the partnership was general merchandising; and, second, that even though it be true that Lewis had not the implied authority or the express consent of his partners to open business in Hamilton, still by their subsequent conduct, after they knew he had done so, they ratified the acts of Lewis in so doing, and in relation to the questions under discussion, the case stands the same as though the latter had commenced business there, by and with the previous consent of his partners.

The purchase of real property may or may not be within the scope of partnership business. If it is, one partner can buy it, if the purchase be made actually or ostensibly for the partnership, and thereby bind the firm—the vendor acting in good faith—just as he can purchase personal property under similar circumstances. No rule of law prohibits a partner from purchasing either, if such purchase is fairly within the scope of the business. Each gives the other, when the partnership is formed, an implied authority to enter into any contract within the scope of the business. If a partnership is formed for the sole purpose of dealing in lands, either may purchase them for the firm, and thereby bind his partners; but he would have no right, by reason of the partnership relation, to buy personal property, unless it be for the proper management, and in aid, of the partnership business.

If the business of a partnership is buying and slaughtering cattle, the managing partner can not, in consequence of the partnership alone, bind the firm by the purchase of a

store, a saloon or a theater, for speculative purposes; but he can buy either for the firm, if he makes the purchase for a slaughter-house, and the vendor acts in good faith, believing from representations of the purchasing partner that it is bought for the business of the firm.

Two men in Carson form a partnership for the purpose of keeping a hotel in Eureka. They agree that each may give the notes of the firm, draw bills of exchange and checks, if he deems proper, in all matters within the scope of the partnership business, thus giving one another the same power that defendant had without such agreement. One goes there as the managing partner. He finds a building that is a fit place for the business. He can hire at a high rent, or purchase at a low figure, and he buys instead of hiring. He can not run the hotel without supplies, and therefore buys them at a neighboring store. He then goes to one bank and tells the cashier that the firm has bought the hotel and intends to keep it; that they wish to borrow a stated sum of money to be used in payment. The money is loaned on six months' time, and the firm note given. He then goes to another bank and informs the cashier that he wishes to borrow money to pay for supplies bought for the firm. That money is loaned on the same time, and the firm note given. Can it be said that the purchase of the house for a hotel was outside of the scope of the partnership business, while buying supplies was within it, and that knowledge of the purchase by the first cashier would defeat an action upon the note received by him, while upon the second the firm is bound?

In my opinion the buying of supplies was not more within the scope of the business than the purchase of the hotel. Both were required, and both appertained to hotel-keeping only.

Two men as partners established a stage line between Carson and Bodie. One, the active, managing partner, buys stock, grain, coaches and hay. For those articles he can undoubtedly bind the firm, whether he makes judicious bargains or not. But it is necessary to purchase, build or hire barns. In one place he builds, in another hires, in

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another buys on credit. All those acts are entirely within the scope of the partnership, and one as much as the others. In the case last supposed, if both partners had been present, they might have concluded to accomplish the same end by different means; where one built, both might have deemed it expedient to hire, but had they done so, the acts of both would not have been more within the scope of the partnership than was the act of one. Any act which would have been within the scope of the business, if both had acted in concert, is equally so if it is done by one. In this case, if all the defendants had been present, and had purchased the store for speculative purposes, it would have been outside of the business of general merchandising. So it would have been had Lewis bought it for that purpose. So it was if he did purchase it for that purpose; and had Harker known that such was the object of the purchase, instead of having good reason to think—if his own testimony is true—that the firm had started business in Hamilton, and needed the store for their legitimate purposes, a different case would have been presented.

Brooke v. Washington, 8 Grattan, 250, is an interesting case in this connection.

Perdue, Nichols, Brooke and Jewell entered into partnership for carrying on the business of iron-making in Jefferson county, and accordingly carried it on for about two years. Perdue and Nichols resided in the county, and were the ostensible partners, while Brooke and Jewell were non-residents of the state. The firm name was "Perdue, Nichols & Company." The respondent, Washington, sold and conveyed to Perdue and Nichols eight hundred and forty-three acres of land in Jefferson county, for six thousand two hundred dollars, of which one thousand one hundred dollars were paid at the time, and for the balance they gave their bonds and a deed of trust on the land, to secure payment. The cash payment was made by the check of Perdue, Nichols & Co., and entries were made on their books crediting Washington in account with the firm for six thousand two hundred dollars, the purchase money of the land, and debiting him with one thousand one hundred

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dollars, the cash payment. During the operations of the partnership for some eighteen months after the purchase, five thousand cords of wood were cut from the land and used in the firm business. Rents for a portion of the land were received by the firm and entered on their books. It was not generally known that Brooke and Jewell were partners, nor did Washington know it at the time of the sale of the land. Brooke had access to the books, but it did not appear that he examined any account but his own. The firm became insolvent, and Washington brought suit and endeavored to charge the balance due upon the individual partners, the land having become comparatively valueless by reason of the destruction of timber and trees thereon. Brooke alone filed an answer and placed his defense principally upon the ground that the purchase was not made on account, or upon the credit, of the firm, or by his authority, and was not within the scope of the partnership.

We quote briefly from the court's opinion: "The purchase was within the scope of the partnership, for the operations of the furnace could not be carried on without fuel; and the best mode of obtaining it was to purchase land in the neighborhood, well covered with wood, as was the land of Washington. All the partners are therefore bound for the purchase money on the authority of the cases before cited." (See, also, *Weaver v. Tupscott*, 9 Leigh, 424; *Burnley v. Rice*, 18 Tex. 494.)

In Schouler's Pers. Prop. the author says, on page 225: "It was formerly deemed that partners could not, as such, own real estate, nor, indeed, transact business in lands at all. But the law in this respect has changed with the wants of trade. Not only does a partnership find real estate suitable for the purposes of investment, but lands and buildings are frequently desired for stores, warehouses and factories in connection with the partnership pursuits. * * * The American rule, as now established, is that real estate purchased and held as partnership property is so treated in equity and subjected to all the partnership incidents." (See *Lacy v. Hall*, 37 Pa. St. 360; *Erwin's Appeal*, 39 Pa. St. 537.) And admitting that Harker was bound to know

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that the purchase was within the partnership business, then, as regards the goods, it must appear that the purchase of stationery was within the scope of the business of general merchandising. He was not bound to know that defendants had never, in fact, dealt in stationery. If buying and selling stationery was within the scope of the partnership as much as dealing in provisions, groceries and clothing, then Lewis had power to purchase it and bind the firm by his act. Had defendants' business been dealing in hardware only, either could have bound the partnership in the purchase of any article that could be considered as legitimately belonging to that line of trade. They may have never dealt in stoves, yet stoves are hardware, and the seller need not have stopped to inquire whether or not the firm had ever dealt in them before. So it is in this case, if buying and selling stationery is within the scope of general merchandising. There is no kind of business that permits within its legitimate scope a more extended dealing than the one under consideration. Why it does not, or should not, include stationery, if that article is in demand at the place of business, as well as groceries, clothing, dry goods, etc., counsel for defendants has not informed us, and the books certainly do not so teach. (See Bouv. Dict., tit. "Merchandise." *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story's R. 51.)

If Lewis had bought stationery in San Francisco under the same circumstances, we hardly think defendants would have claimed that he acted beyond the scope of the partnership. If the partnership had been formed for the purpose of carrying general merchandise from the railroad to Hamilton, in an action to recover the value of stationery lost or destroyed, we venture the opinion that the defendants would not have urged, in defense, the proposition so persistently argued here, that stationery cannot properly be classed with general merchandise. In his work on Part. page 201 (6th ed.), Mr. Story says: "If persons are engaged in the mere business of tallow chandlers, as partners, a purchase of a cargo of flour, or of pepper, or of coffee, or of other things, by one partner, wholly beside the business of the

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firm, would not bind the other partners. But if the articles were such as might be applied or called for in the ordinary course of their business, the purchase of such articles would bind the firm, even though they were unnecessary at the time, or were bought contrary to the private stipulations between the partners, or were not designed to be used in the partnership at all, if the vendor were not acquainted with the facts." (See also *Livingston v. Roosevelt*, opinion of Kent, Ch. J., 1 Am. Lead. Cas. 427; *Winship v. Bank U. S.*, 5 Pet. 560; Bateman¹ on Commercial Law, 587, 595, 596, 601; Collier on Part. 484; Smith's Merc. Law, 76; Gow on Part. 53, 56, 61, 68; *Bond v. Gibson*, 1 Camp. 184; *Freeman v. Carpenter*, 17 Wisc. 137; *Walden v. Sherburne*, 15 Johns. 422; *Woodward v. Winship*, 12 Pick. 433; *Che-mung Canal Bank v. Bradner*, 44 N. Y. 688; *Beckham v. Drake*, 9 M. & W. 92, *et. seq.*)

None of the authorities cited by counsel for defendants are opposed to our conclusions. Our opinion is, that under the undisputed facts, Lewis acted within the scope of the partnership business in purchasing the stationery and the store, and that the knowledge of such purchase was not sufficient to put Harker upon inquiry as to the consent of the other partners.

A few additional assignments of error will be noticed briefly: If we are correct in the conclusion before stated in relation to the effect of the acts of John A. and Isaac, subsequent to July 1, 1869, the question embodied in the fifth assignment was at least immaterial, and the objection should have been sustained.

The question referred to in the ninth assignment assumed as a fact, that John A. had settled the indebtedness of Cook Bros., when there was no proof of the same. That might have influenced the jury, and it should not have been asked in that form. (*Boyd v. McCann*, 10 Md. 118.)

Plaintiff should have been permitted to ask witness Hilp, on cross-examination, when Cook Bros. commenced business in Hamilton. He had, in chief, testified directly upon that point.

Nothing additional need be said concerning instruc-

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tions seven and nine, asked by plaintiff, or instruction two, given at request of defendants.

The order overruling plaintiff's motion for a new trial is reversed.

HAWLEY, J., having been of counsel at a former trial of this cause, did not participate in the foregoing decision.

[No. 966.]

THE STATE OF NEVADA, RESPONDENT, *v.* EDWARD MALIM, APPELLANT.

INDICTMENT—COUNTS SETTING OUT OFFENSE IN DIFFERENT FORMS. —If an offense is set forth in different counts, it must be done in such a way as to show clearly upon the face of the indictment that the matters and things set forth in the different counts are descriptive of one and the same transaction.

IDEM—EMBEZZLEMENT. —An indictment for embezzlement contained two counts, each identical as to the time, place, names of persons and description of property: *Held*, that the indictment charged but one offense.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts appear in the opinion.

Lindsay & Dickson, for Appellant.

The demurrer ought to have been sustained. The indictment charges two distinct offenses. The statute is imperative that the indictment shall charge but one offense. (1 Comp. Laws, 1862; see, also, *Id.* 1858, 1860; 1 Wharton C. L. 414, *et seq.*; *The People v. Thompson*, 28 Cal. 217; *People v. Shotwell*, 27 *Id.* 400.)

M. A. Murphy, Attorney-General, for Respondent.

By the Court, HAWLEY, J.:

Appellant was indicted, tried and convicted of the crime of embezzlement.

The indictment contains two counts. Leaving out the heading and conclusion, the respective counts read as follows:

1. "Edward Malim is accused by the grand jury of the

county of Storey, by this indictment, of the crime of embezzlement, committed as follows, to wit: That the said Edward Malim, on or about the seventh day of July, A. D. 1877, and before the finding of this indictment at the county of Storey, state of Nevada, was employed and hired in the capacity of clerk to L. P. Drexler and George H. Dana, and as such clerk, was instructed to receive, by his said employers, large sums of moneys, certificates of mining stocks and other articles of great value, and being so employed and intrusted as aforesaid, the said Edward Malim, by virtue of such employment, then and there did receive and take into his possession, and was by his said employers intrusted with one hundred gold pieces, coins of the United States, of the denomination of twenty dollars each, the property of said L. P. Drexler and George H. Dana; four hundred silver pieces, coins of the United States, of the denomination of fifty cents each, the property of said L. P. Drexler and George H. Dana, and a large number of gold notes, of the currency of the United States, of the aggregate value of one hundred and twenty dollars, the property of the said L. P. Drexler and George H. Dana, and that the said Edward Malim, on the day and year last aforesaid, while so intrusted with and in possession of said described moneys and property did withdraw himself from his employers aforesaid and go away with the said money with the intent to steal the same and defraud his said employers thereof, and without their consent, contrary to the trust or confidence in him reposed by his said employers."

2. "That the said Edward Malim on or about the seventh day of July, A. D. 1877, at the county of Storey, state of Nevada, was a hired clerk and in the service or employment of L. P. Drexler and George H. Dana, and that the said Edward Malim, being so in the service of his said employers, did then and there feloniously embezzle and convert to his own use, with the intent and purpose to steal the same, one hundred gold pieces, coins of the United States, of the denomination of twenty dollars each, four hundred silver pieces, coins of the United States, of the denomination of fifty cents each, and a large number of gold notes of the

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currency of the United States, of the aggregate value of one hundred and twenty dollars; all of said moneys then and there being the property of his said employers, L. P. Drexler and George H. Dana."

A demurrer was interposed to this indictment on the ground that it charges two offenses. It is claimed by appellant that this demurrer ought to have been sustained because the words "said" or "aforesaid" are not used in the second count with reference to the time when the offense was alleged to have been committed and to the description of the property alleged to have been embezzled, and because these or other equivalent words were not so used it is argued that this court has no right to presume that the second count relates to the same offense as that charged in the first count.

To sustain this position we are referred to *The People v. Shotwell*, 27 Cal. 400; *The People v. Thompson*, 28 Id. 217.

The statute of this state, like that of California, declares that: "The indictment shall charge but one offense; but it may set forth that offense in different forms under different counts." (1 Comp. Laws, 1862.)

In *The People v. Shotwell*, the defendant was indicted for forgery. In the second count, the check was set out in the identical language of the check described in the first count; but it was distinguished from it by being described as the "last mentioned" check. The court, therefore, very properly said that it was not possible, "from the face of the indictment, to say that the same check was intended to be described in both counts; and though the copies are alike, *verbatim et literatim*, it is not to be presumed that each is a copy of only one and the same original instrument." Certainly not, because such a presumption would be contrary to the plain meaning and intent of the words, "last mentioned" check, as used in the second count.

It does not, however, follow from any reasoning of the court that if the words "last mentioned" had not been used the court would have decided that the indictment charged two offenses.

If one offense is set forth in different counts, it must al-

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ways be done, as stated in *The People v. Thompson*, in such a way "as to show clearly upon the face of the indictment that the matters and things set forth in the different counts are descriptive of one and the same transaction," and "the use of the words 'said' or 'aforesaid,' or other equivalent expressions in the second count of an indictment," may often be found "indispensable in order to fix the identity of the offense therein stated with that contained in the first count." It would doubtless be better pleading to always use them. (*People v. Ah Sam*, 41 Cal. 648.) It would never do any harm and might often do good. It would in every case prevent the question here presented from being raised, and inasmuch as the age of technicalities will never pass away, the pleader ought in every instance to use every precaution to make his pleading clear, plain and perfect. In *The People v. Thompson*, no words were used in the indictment to show "that the Crescent City Hotel, of the second count, is the Crescent City Hotel of the first, except that the names of the hotel and its proprietor are the same in both." The court decided that the identity of the names of the houses and their proprietors is *prima facie* evidence of the identity of the two houses, and that they are, in fact, one and the same house.

Now, applying that principle to the case in hand, does it not necessarily follow that the identity of the time, place, names of persons and description of property is *prima facie* evidence, at least, that they are the same? What principle of law exists that would authorize this court to indulge in the presumption that the two counts actually charge two different offenses, when the fact appears affirmatively upon the face of the indictment that the language of each count is identical as to the time, place, persons and property, and no words are used in either count tending in the slightest degree to show that more than one offense is intended to be charged? If we were to hold that the indictment charged two offenses, would it not be substituting a violent presumption for an apparent fact? It is true a case might be imagined where a defendant at

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different times "on or about" the same day, at the same place, and from the same person, might embezzle the same amount and character of money. Such an event is possible. But is it true that because such an event might happen, a court must presume that it did in this case? It was within the wide range of possibilities that the defendant Thompson, in 28 California, actually broke into the Crescent City Hotel at two different times on the same day, and that at one time he intended, as charged in the first count, to steal the goods of John McRaith; and at the other time, as charged in the second count, to steal the goods of John McGrath.

It was admitted upon the oral argument that it would be proper in indictments for robbery, in different counts, to charge the property as belonging to different persons. Now, unless such indictments appropriately used the words "said" or "aforesaid" in describing the money or other property, why might it not there, as well as here, be claimed that the indictment charges two offenses?

In *The State v. Chapman*, the indictment charged the robbery in two counts, the only difference being "that in one the money is charged as being the property of Wells, Fargo & Co., and in the other it is laid in the messenger having at the time special custody thereof."

The objection that the indictment charged more than one offense was summarily disposed of, and the district attorney was commended for the excellent manner in which the indictment was framed. (6 Nev. 325.)

The counts in that indictment were not in any manner connected by the words "said" or "aforesaid," or other equivalent words.

Is it not evident from the general framework, language and structure of the indictment in the present case, that the same offense was intended to be and is charged in each count? If so, that is all the law requires. (*State v. Rust*, 35 N. H. 441.)

Is it not apparent upon the face of the indictment to "a person of common understanding" (1 C. L. 1867) that the different counts, charging the same offense in different

Points decided.

ways, were inserted for the purpose of meeting the evidence as it might turn out upon the trial, and be admissible under the provisions of section 74 of the act concerning crimes and punishments? (1 C. L. 2380.) We think it is.

Whenever such facts appear, courts invariably sustain the indictment, no matter in what form the objection may be made or whether the law allows more than one offense or not to be charged in the indictment. (*State v. Nelson*, 11 Nev. 339; *Engleman v. The State*, 2 Ind. 91; *Joy v. The State*, 14 Id. 144; *State v. McPherson*, 9 Iowa, 56; *People v. McKinney*, 10 Mich. 95; *State v. Canterbury*, 28 N. H. 227; *State v. Lincoln*, 49 Id. 464; *Mayo v. State*, 30 Ala. 33; *U. S. v. Dickinson*, 2 McLean, 327; *State v. Hood*, 51 Me. 364; *Hampton v. State*, 8 Humph. 71; *Cash v. State*, 10 Id. 113; *Reg. v. Trueman*, 8 C. & P. 727.)

We are of opinion that the court did not err in overruling the demurrer.

The judgment of the district court is affirmed.

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16	337

14	293
23	416

[No. 883.]

TRUCKEE LODGE, No. 14, I. O. O. F., APPELLANT, v.
BENJAMIN WOOD ET AL., RESPONDENTS.

STATEMENT—OBJECTIONS TO WHEN WAIVED.—When counsel appear and orally argue a case upon its merits and afterwards, by leave of the court, file a brief and therein rely upon objections to the statement: *Held*, that the oral argument upon the merits amounted to a waiver of the objections to the statement. (Hawley, J., dissenting.)

CONTRACT — ADMISSIBILITY OF EVIDENCE — MECHANICS' LIENS — NOMINAL DAMAGES—COSTS.—Plaintiff brings suit and claims damages against W. & R. for breach of contract in building Odd Fellows' Hall. The contract provided that plaintiff should not be held accountable for any labor or materials furnished in said building. Plaintiff offered to prove that W. & R. had incurred indebtedness to sub-contractors and others, who had filed liens upon the building and brought suits to foreclose the same. The court refused this evidence: *Held*, 1. That plaintiff, it not being shown that it had paid anything upon said liens, was only entitled to recover nominal damages for this breach of the contract; 2. That if the plaintiff should have been allowed to prove the existence of the liens for the purpose of showing nominal damages, the error in excluding the proof is not ground for a new trial, when such damages do not entitle plaintiff to recover costs.

Statement of Facts.

IDEM—COUNTER-CLAIM.—W. & R., in their answer, as a counter-claim, allege a balance due upon the original contract, and a balance due for extra work: *Held*, That the refusal of the court to permit plaintiff to introduce proof of the existence and amount of the liens, was error; that such facts were admissible for the purpose of defeating the contractors' counter-claim to the extent of the full amount of valid liens for labor and materials furnished to the contractors.

IDEM—VALUE OF WHOLE BUILDING.—Against plaintiff's objection, the court allowed defendant to ask a witness: What is the reasonable value of the whole material and work done in the erection of that building as it now stands? *Held*, error to allow defendants to prove the value of any thing not done by W. & R., and then only as to extra work and materials.

IDEM.—The court refused to allow plaintiff to prove the difference between the value of the building as completed, and as agreed to be completed: *Held*, not error.

IDEM—ALTERATIONS—EXTRA WORK—WAIVER OF AGREEMENT.—The contract provided for changes in the plans, and that extra pay therefor should be either mutually agreed upon or referred to arbitrators before any changes were allowed to be made. The price for extra work had not been agreed upon or settled as the contract required: *Held*, in reviewing the testimony, that the fact that the contractors were willing to agree upon the price of changes; that they urged plaintiff to fix the same, and that plaintiff refused but continued to order changes, amounted to a waiver of the clause inserted in the contract for plaintiff's benefit.

IDEM—RIGHTS OF SURETIES.—*Held*, that the failure of plaintiff to make the weekly payments as specified in the contract released the sureties upon the contractor's bond.

IDEM.—*Held*, that the failure to retain money, in excess of \$10,800, until the completion of the contract, as agreed upon, released the sureties.

IDEM.—*Held*, that if plaintiff permitted and requested changes to be made without previously agreeing upon the price of the same as specified, it was such a material change in the contract as would release the sureties.

JUDGMENT CORRECT—ERRONEOUS INSTRUCTIONS.—A judgment will not be reversed for any error in the instructions when it is apparent that the verdict would have been the same with correct instructions, and when the court below could not have refused to grant a new trial had the verdict been for the opposite party.

LIABILITY OF SURETIES CAN NOT BE CHANGED WITHOUT THEIR CONSENT.—The liability of a surety can not be changed without his consent, even though such change is advantageous to him.

APPEAL from the District Court of the Second Judicial District, Washoe County.

At the request of the sureties the court gave the following instructions, which are referred to in the opinions.

Statement of Facts.

8. "The defendants, C. A. Bragg, A. C. Bragg, L. L. Crockett, and J. C. Hagerman are sureties, and their contract with the plaintiff is to be construed strictly; their liability is not to be extended beyond the terms of their contract; to the extent and in the manner, and under the circumstances pointed out in their obligation, they are bound, and no further. It is not sufficient that they may sustain no injury by a change in the contract, or that it may even be for their benefit. They have a right to stand upon the very terms of their contract, and, if they do not assent to any variations of it, and a variation is made, it is fatal."

9. "Under the contract the building committee were required to pay the contractors the sum of nine hundred dollars on August 26, 1876, and a similar sum on each Saturday thereafter for eleven successive weeks. You are instructed that any failure or neglect to pay any of said sums, or the full amount thereof, on the dates agreed upon, or about such dates, not agreed to or acquiesced in by the sureties, releases them, and, if you find the facts so to be, you must find against the plaintiff so far as the sureties are concerned."

10. "Under the contract the plaintiff's building committee agreed to retain from the contractors any balance that should be due them under their contract after the payment of ten thousand eight hundred dollars, until their job was completed. You are instructed that if you find the committee did pay the contractors more than said sums before their job was completed, and without the consent or agreement of the sureties, the contract of suretyship is violated, and the plaintiff cannot recover against them."

11. "Under the contract alterations or changes may be made upon request of the building committee, provided the extra price or deduction in price for the same is mutually, or by arbitration, agreed upon before such change is made. You are instructed that if you find that any charges were made without such agreement as to price being made, the sureties are exonerated."

12. "You are further instructed that the provision in the

Argument for Appellant.

contract does not mean any change that might be requested by the building committee, but only refers to changes and alterations made in conformity with the contract and the general plan of the building. Therefore, if you find that any change was made by the committee and contractors, not in conformity with the contract and general plan of the building, without the consent of the sureties, and that such change was material and imposed additional burdens on the contractors, the sureties are exonerated from liability on their bond. And if the change was a material departure from the plans and specifications, it makes no difference whether it was favorable to the contractor or not."

13. "The sureties are not bound by any parol agreement that the plans referred to in the contract and their bond should be considered reduced in scale, made subsequent to their undertaking, unless such agreement was assented to by them. Therefore, if you find that such an agreement was made, and that by the same the plan of the building was materially changed, and that the building was built in accordance with such parol agreement without the consent of the sureties, you will find for them."

Robert M. Clarke, for Appellant.

I. It was a breach of the builder's contract to suffer liens for labor and materials to attach, and the amount of their liens was the measure of damages for the breach.

II. The defendants, Wood and Richards, had no action upon the contract for the recovery of any unpaid balance until they had fully satisfied the liens for the labor and materials.

III. In an action upon a contract to recover for failure to complete a building at the time specified, and for omitting to do certain specified work, it is error to permit the defendant, for the purpose of reducing plaintiff's demand or defeating recovery, to show the value of the work done and material furnished. The contract itself furnishes the only just measure. (61 Mo. 270; 17 N. Y. 175.)

IV. The contract in this case provided for alterations and extra work, and specified that all extra pay should be fixed

Argument for Respondent.

in advance by mutual agreement or arbitration. In view of this provision it was error to permit the defendant to prove extras not requested and agreed upon as specified in the contract. (24 Wend. 448; 17 N. Y. 175, 176.)

V. The changes shown to have been made in the plans and details of construction of the building are not alterations of the contract in the sense of the term. (50 Cal. 419; 24 Vt. 440; 27 Id. 125, 673.)

VI. The court erred in the instructions which it gave to the jury. As to the sureties the case was tried upon a total misapprehension of the law. It is not the law that any variation from the written contract releases the sureties. On the contrary, no variation, however material, could so operate if made without the sanction of plaintiff, and no alteration in the plans or details of construction, however material, could operate to release the sureties if made pursuant to the contract. And no alteration in the mere details could operate to release the sureties unless prejudicial to them.

N. Soederberg, also for Appellant.

Thomas E. Haydon, for Respondent Wood.

I. No notice of motion for new trial was ever filed or served upon the defendants Wood or Richards. The motion for new trial cannot be considered. (*Killip v. Empire Co.* 2 Nev. 34; *Wright v. Snowball*, 45 Cal. 654; *State v. First National Bank*, 4 Nev. 358.) The statement in so far as defendants Wood and Richards are concerned, has never been authenticated in the manner required by law. (*White v. White*, 6 Nev. 20; *Lockwood v. Marsh*, 3 Id. 138; *McCausland v. Lamb*, 7 Id. 238; *Irwin v. Samson*, 10 Id. 282.)

II. Any action by plaintiff to recover damages on account of the liens filed against the building is premature. The defendants did not covenant that no liens should be filed. Prospective damages cannot be recovered. (6 Nev. 203.) Damages can only be estimated by the actual injury a party has received. (2 Green on Ev. sec. 265.)

III. The findings of the court below are conclusive

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upon the facts. There is a substantial conflict of evidence. The statement does not purport to contain all the testimony given at the trial. (4 Nev. 156, 304; 5 Id. 281, 415; 6 Id. 203, 215; 8 Id. 41, 118, 126; 9 Id. 152.)

IV. The evidence shows that the contractors were unable to obtain a settlement of the changes and alterations directed by the architect. The owners of the building could do it, for it was for their benefit. (*Blethen v. Blake*, 44 Cal. 117; *McFadden v. O'Donald*, 18 Id. 160.)

V. Where a special contract for work is proven, but the contract is deviated from, testimony may be admitted as to the value of the services rendered. (*De Boom v. Priestly*, 1 Cal. 206; *Reynolds v. Jourdan*, 6 Id. 108; 7 Id. 161; *O'Connor v. Dingley*, 26 Id. 20; *Whiting v. Heslip*, 4 Id. 327; 4 Id. 274; 4 Id. 335.)

Boardman & Varian, for Respondents Bragg *et al.*, sureties.

There were several material departures from the contract. The alterations in the building were not made as provided for in the contract. Plaintiff agreed with the contractors to disregard the provisions of the written agreements.

Having undertaken to protect itself by controlling the contractors in the matter of payments, in utter disregard of the undertaking with the sureties, it can not now resort to the bond which it repudiated during the progress of the work. (*Miller v. Stewart*, 9 Wheat. 704; *Quillen v. Arnold*, 12 Nev. 234; *Bragg v. Shain*, 49 Cal. 134; *U. S. v. Howell*, 4 Wash. C. C. 620-623; *Grant v. Smith*, 46 N. Y. 98; *Zimmerman v. Judah*, 13 Ind. 286; *Finney v. Conlen et al.*, Ill. Sup. Ct. Legal News, Feb. 23, 1878, No. 488, p. 182.)

By the Court, LEONARD, J.:

This is an action for damages for alleged breaches of contract. Respondents, Wood & Richards, were contractors and builders. They entered into a written contract to build for appellant an Odd Fellows' Hall and building in Reno, and to secure a faithful performance of the same, executed and delivered to appellant an undertaking in the penal sum

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of ten thousand dollars. Wood and Richards were principals and the other respondents sureties. In its complaint appellant alleges failure to perform according to the contract, plan and specifications, and demands judgment therefor in the sum of five thousand two hundred and thirty-four dollars and twenty-one cents. The principals and sureties answered separately. They deny all alleged breaches of the contract on the part of Wood & Richards, and aver full performance thereof. Wood & Richards allege that there is a balance of two thousand four hundred and nine dollars and eighteen cents due upon the original contract, and the further sum of four thousand seven hundred and forty-four dollars for extra labor performed and materials furnished at the request of appellant, for which sums they demand judgment. The sureties allege that there is due Wood & Richards, upon the original contract and for extra work and materials, the sum of six thousand two hundred and ninety-four dollars. Other parts of the pleadings will be referred to as we proceed in the examination of questions presented for consideration. At the trial, respondents, Wood & Richards, obtained judgment against appellant for one thousand and ten dollars and thirty cents, and the sureties were released. This appeal is from an order overruling appellant's motion for a new trial, and from the judgment. Objections have been made to the transcript, all but one of which could be waived, and that has been removed by amendment. Counsel for Wood & Richards argued the case upon its merits without intimating that there were any faults in the transcript, and not until months thereafter were any objections made thereto. We shall consider the case upon its merits, believing the objections now made have been waived.

I. The contract above referred to provides that the appellant shall not in any manner be answerable or accountable for any of the materials or other things used or employed in finishing said building. In its complaint appellant alleges, "That in partial performance of the said contract, the said Benjamin Wood and E. S. Richards incurred indebtedness to sundry persons for work and labor performed

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and materials furnished, to be used, and which were used, in constructing said building, in the sum of four thousand seven hundred and ninety-three dollars and thirteen cents gold coin of the United States, which said indebtedness became, and is, a lien against plaintiff's said building and premises, and for the payment of which plaintiff and its said building and premises are liable, wherefore plaintiff has been greatly injured and damaged in the sum of four thousand seven hundred and ninety-three dollars and thirteen cents, etc." To maintain its claim for damage on account of the liens mentioned, appellant offered to prove, by the records of the county recorder of Washoe county, that Wood & Richards had incurred said indebtedness to the persons named in said records; that the materials and labor therein mentioned had been furnished at the request of said contractors and used in and about the construction of said building, and that the contractors had failed and refused to pay the same or any part thereof; that the same were then valid and subsisting liens upon the building in question; that plaintiff was liable to pay the same, and that suits had been commenced to foreclose them. Counsel for respondents objected to such proof, for various reasons stated, and it was rejected.

In rebuttal, appellant offered to prove the same facts for the purpose of defeating the claim of Wood and Richards for extra work, etc., upon the building. This proof was also excluded by the court, and its action in excluding the offered proof to support appellant's claim for damages on account of said liens; also, to defeat recovery by Wood and Richards upon the counter claims set up by them in their answer, is assigned as error.

It is first claimed by counsel for appellant, that the proof offered should have been admitted for the purpose of showing damage resulting from a breach of the contract, and that the amount of the liens is the measure of such damage. If it be conceded that the contractors broke their contract by permitting liens to be filed, etc., still the admitted fact remains, that there was no offer to prove that appellant had paid any sum for their satisfaction, or had otherwise been

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damaged by reason of their existence. Such being the case, appellant was entitled to recover, at the most, nominal damages only, on account of the breach complained of.

Had actual damages been allowed against defendants on account of the liens, the contractors might have been compelled to pay twice for the same thing. The lien-holders might have dismissed their foreclosure suits and brought an action against the contractors. A judgment for damages in this case, in favor of appellant for the full amount of the liens, would not bar such an action. The lienholders are not parties, and would not have been bound by any judgment in this case. Hence, as before stated, had appellant recovered actual damages on account of the liens, the lienholders might thereafter have dismissed their foreclosure suits, waived their liens, brought actions against the contractors, and recovered judgment to the extent of the amount due, regardless of the fact that theretofore judgment in this case had been rendered against them for the same claims. (*Prescott v. Trueman*, 4 Mass. 627; *Wyman v. Ballard*, 12 Id. 305; *Tufts v. Adams*, 8 Pick. 547; *Harlow v. Thomas*, 15 Id. 68; *Sedgwick on Dam.* 44, *et seq.*) And if, technically, appellant should have been permitted to prove the existence of the liens for the purpose of showing nominal damage, that error is not ground for a new trial, in cases where, under statutes like ours, such damages do not entitle the plaintiff to recover costs. (*Jennings v. Loring*, 5 Ind. 250; *Sedgwick on Dam.* 54.)

The refusal of the court to permit appellant, in rebuttal, to introduce proof of the existence of the liens, and that suits were then pending to foreclose the same, was error. Section 10 of the lien law (Stat. 1875, page 123) is as follows: "The contractor shall be entitled to recover upon a lien filed by him, only such amount as may be due to him according to the terms of his contract, after deducting all claims of other parties, for work done and material furnished as aforesaid; and in all cases where a lien shall be filed under this chapter, for work done or materials furnished to any contractor, he shall defend any action brought thereupon at his own expense; and during the pendency of such

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action the owner may withhold from the contractor the amount of money for which such lien is filed, and in case of judgment against the owner or his property upon the lien, the said owner shall be entitled to deduct from the amount due or to become due by him to the contractor, the amount of such judgment and costs; and if the amount of such judgment and costs shall exceed the amount due by him to the contractor, or if the owner shall have settled with the contractor, he shall be entitled to recover back from the contractor any amount so paid by him, the said owner, in excess of the contract price, and for which the contractor was, originally, the party liable."

Under that section, it is too plain for argument that appellant should have been permitted to make proof of the facts stated, for the purpose of defeating respondents' counter claims, to the extent of the full amount of valid liens for work done and materials furnished to the contractors, Wood & Richards. If appellant had the right to withhold from the contractors the amount of money for which the liens were filed, during the pendency of the foreclosure suits, certainly the contractors could not recover judgment for any portion of the money so withheld.

II. Against appellant's objection, respondents were permitted to ask Wood this question: "What is the reasonable value of the whole material and work done in the erection of that building, as it now stands?" The witness answered: "Twenty-seven thousand dollars." It will be noticed that the question included the value of all the materials furnished and labor performed in the construction of the building. It embraced within its scope, not only the value of the labor and materials used in performing the extra work, but also the value of the materials and labor furnished and performed under the special contract between the contractors and appellant. Nor is that all. It embraced the value of all that was done by Ferguson & O'Hara, who did the mason work under a separate contract.

In their answers, as we have seen, respondents allege that a certain sum is due Wood & Richards for work done under the written contract, and an additional sum for extra

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work, of the value stated. For the work done under the special contract, Wood & Richards' damages must be measured by that agreement. It was error to allow respondents to prove the value of anything not done by Wood & Richards, and then only as to extra work and materials. (*Railway Company v. Vosburgh*, 45 Ill. 313; *Sedgwick on Dam.* 235 *et seq.*)

III. The court did not err in refusing to permit appellant to prove the difference between the value of the building as completed and as agreed to be completed. It is alleged in the complaint that Wood & Richards have failed to finish the building according to contract, and that the labor and materials necessary to so finish it will cost the appellant, and be reasonably worth, nine hundred and twenty dollars in United States gold coin. There is no allegation or claim contained in the pleadings that would have justified the court in permitting appellant to make the proof stated.

IV. The contract in question provided as follows: "All alterations or changes in the plans during the course of construction of said building which may be requested by the parties of the first part (appellant), shall be made by the parties of the second part (Wood & Richards); but all extra pay or deductions in price for work, by reason of such change, shall be, either mutually or by reference to arbitrators, agreed upon and settled by the parties hereto, before said change is allowed to be made."

In view of these provisions of the contract, and of the fact that the price for extra work had not been agreed upon or settled as the contract required, counsel for appellant objected to questions propounded to respondent Wood, as to the cost of extras, "because it is sought to prove by this witness, that changes were made which are not shown to have been requested by the committee, and the price of which was not agreed upon by the parties or submitted to arbitrators." To meet that objection, Wood then testified that a great number of changes had to be made, and that they were all made by order of appellant, but no proof was made that the prices for extras or changes were agreed upon.

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The court then admitted the evidence objected to, and appellant accepted. Subsequently, during the examination of the same witness, he testified that the prices of changes had not been fixed, with one exception. He stated, however, as the reason why they were not fixed, that he asked Mr. Bowker, one of appellant's committee, to give him a paper as to the prices, etc.; that he received such paper, but that the prices were not carried out; that Bowker wanted him to go to Sturgeon, the architect, for the reason, as stated, that he (Bowker) could not get the committee together; that if witness wanted it done he would have to go to Sturgeon. Witness also stated that the reason why the prices were not inserted in the paper referred to, was because they had not been agreed upon; that he said to Bowker: "Let us agree to it;" that Bowker told him that he could not get the committee together. On cross-examination witness testified: "We could not get anything from them" (meaning the committee); "they would not agree. Mr. Sturgeon would serve me with an order that I had to do that. I delayed the floor over two weeks before I would lay it." Witness stated also that he asked that the question of price be submitted to arbitrators.

Counsel for appellant still urges the same objection made in the court below. In view of all the facts, we shall not review the argument of counsel—that no proof of the price or value of extras or changes was admissible, without showing also that such price was agreed upon or awarded by arbitrators. In our opinion, the general legal principle invoked by counsel is not applicable to this case. If it be true, that at the time the evidence objected to was admitted, it was inadmissible, for the reason that no preliminary proof had then been made of the efforts of Wood to have the prices fixed, and of the failure of the committee to act when requested so to do; still, such proof was subsequently made by the same witness, and the error, if such it was, was cured. In *United States v. Robeson*, 9 Peters, 326, the court say: "It appears that the agent of the government expressly stipulated to pay the money under the contract on the certificate of Colonel Arbuckle or the officer com-

manding the party. And for any additional services to those provided for in the contract, payment was to be made at the same rate, upon producing duplicate specified certificates of the commanding officer. It does not appear that any excuse was offered why these certificates were not procured; and the question is, whether the claimant, at his option, can establish his claim by other evidence. The contract is a law between the parties in this respect; as they expressly agreed that the amount of the service shall be established by the certificates of the commanding officer, can it be established in any other manner, without showing the impracticability of obtaining the certificates? Is not this part of the contract as obligatory as any other part of it; and if so, is not the obtaining of the certificate a condition precedent to the payment of the money? Where parties, in their contract, fix on a certain mode by which the amount to be paid shall be ascertained, as in the present case, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect. He can not compel the payment of the amount claimed, unless he shall procure the kind of evidence required by the contract, or show that by time or accident he is unable to do so. And as this was not done by the defendant in the district court, no evidence to prove the service, other than the certificates, should have been admitted by the court. Had the defendant proved that application had been made to the commanding officer for the proper certificates, and that he refused to give them, it would have been proper to receive other evidence to establish the claim." In *Smith v. Brady*, 17 N. Y. 174, the defendant agreed to pay the plaintiff a certain sum as the work progressed, and the balance, when all the work should be completed and certified by the architects to that effect. In construing the contract, the court say: "The parties have seen fit to make the production of such a certificate a condition precedent to the payment. The plaintiff is as much bound by this part of his contract as any other.* * * Had it been shown by the plaintiff that he had made application to the architects for the

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requisite certificate, and that they had obstinately and unreasonably refused to certify, it might have been proper, perhaps, for the plaintiff to establish his right to recover by other evidence." (See, also, *Herrick v. Belknap's estate et al.* 27 Vt. 681.)

The case of *White v. S. R. and S. Q. R. R. Co.*, 50 Cal. 417, is inapplicable to this case.

There, the plaintiff, on the verbal order of the engineer, performed extra work not embraced in his contract, of the value of three thousand nine hundred and twenty-three dollars and four cents, and for which the engineer refused to give him a certificate when a settlement was made. The written contract provided that the engineer should have full liberty to make alterations in, additions to, or deductions from, any of the works referred to therein; and that such alterations, etc., should be valued and estimated according to the schedule of prices filled up by the contractor and agreed to by the engineer. But it also provided that "no deviation from any of the provisions of this contract, specification or drawings will be permitted, unless with the sanction in writing of the engineer; nor will any claim of extra work be allowed under any pretense, unless a written order for the same by the engineer can be produced."

Under such a contract the court held that plaintiff could not recover for extra work without producing a written order signed by the engineer. By his contract he had made it impossible for him to make proof by any other means. He had agreed that he should not be allowed for any extra work he might perform, unless he could produce a written order signed by the engineer. In this case respondents Wood and Richards agreed to make such alterations and changes as might be requested by appellant's committee, and that all extra pay or deductions in price for work, by reason of such change, should be agreed upon and settled by the parties mutually, or by reference to arbitrators, before such change should be allowed to be made. There was no agreement, as there was in the case last referred to, which precluded all kinds of proof save one, regardless of whether it was appellant's fault or the contractors' that the

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price was not fixed. It is a general rule of law, and a just one, that a party cannot insist on a condition precedent when he himself has defeated a strict performance. The proof of respondents shows that the contractors were willing and anxious to agree upon the price of changes; that they urged the committee to fix the same; that the latter failed to do so after request, but continued to order changes without fixing the extra pay. Such action on their part was a waiver of a clause inserted for appellant's benefit (*McFadden v. O'Donnell*, 18 Cal. 164; *Blethen v. Blake*, 44 Id. 120), and it was a mode of defeating strict performance by the contractors, which prevented appellant from insisting upon the objection made.

V. By the contract, in consideration of the covenants and agreements being strictly performed and kept by the contractors, Wood & Richards, as specified therein, appellant agreed to pay the contractors a certain sum of money in the following manner, to wit: "Nine hundred dollars on Saturday, August 26, 1876, and nine hundred dollars on each Saturday thereafter, for eleven successive weeks, and the balance when the job is completed." In their answer, respondents, the sureties, allege that the parties of the first part to said contract utterly failed and neglected to pay said sums of money as stated, and at the times stated and agreed. They further allege, by amendment to their answer, that "it was provided by the contract, that all extra pay or deductions in price should be, mutually or by reference to arbitrators, agreed upon and settled before such change should be allowed to be made; that notwithstanding such provision, and without the permission, knowledge or consent of the said defendants, or either of them, the parties to the contract aforesaid made a large number of material changes in the plan and the work of construction, and changed the entire plan of said building, and introduced new and expensive additions, as detailed in the plans and specifications at the time of the execution of the undertaking by said defendants, and utterly failed and neglected to have the extra pay or deductions in price thereof either mutually, or by arbitration, or in any manner, agreed upon

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prior to the making of such alterations, or to have the same agreed upon at any time; that by reason of the changes and alterations aforesaid, and of the failure to have the price for the same settled as aforesaid, the contract with them was violated and their obligation released." Respondents, the sureties, testified that they were never advised of, or acquiesced in, or consented to, any of the changes, testified to as material, from the original plan and specifications; that they knew nothing of the failure of the building committee to pay each installment to the contractors as it fell due, nor authorized the committee not to pay the same; and that they did not consent to the building committee overpaying the contractors more than ten thousand eight hundred dollars specified in the contract, before the completion of the building. Moreover, the burden of proving ratification or waiver was upon appellant, and the record contains no proof of either.

The appellant did not claim to have paid the contractors weekly, as it agreed to do. The first payment of nine hundred dollars was due August 9, 1876, and the last, November 11, 1876, making in all ten thousand eight hundred dollars, to be paid as before stated, and the balance when the building was completed. Whereas it appears from appellant's own evidence, by the testimony of Mr. Kinhead, who paid the money to the contractors, and of Mr. Bowker, one of appellant's committee, that only six thousand nine hundred dollars had been paid on the eleventh of November; that afterwards, at irregular intervals, other sums were paid until February 21, 1877, when the last payment was made, at which date the total amount paid was eleven thousand seven hundred and ninety dollars and eighty-two cents, being nine hundred and ninety dollars and eighty-two cents in excess of the amount appellant agreed to pay before the completion of the contract, and which it agreed not to pay until the contract was completed; that before the eleventh of November, as well as after, in many instances the payments were not made when they were due; that the reason why payments were not made according to the terms of the contract, was because Wood & Richards did not appear to

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be doing anything, and under such circumstances appellant was unwilling to advance money. It does not appear, definitely, when the building was completed, but it was certainly subsequent to February 21, 1877, the date of the last payment. In the complaint it is alleged that it was incomplete at the time the action was commenced, March 12, 1877. Mr. Bowker testified that the upper story was first occupied about April 1st. In fact, appellant claimed damage from November 15, 1876, until April 1, 1877, for failure to complete the upper story at the time stated in the contract. Besides, the specifications called for eight quite elaborate secretaries. Mr. Wood testified that they were not shipped from San Francisco until about the middle of March, 1877, and were put up in the building after that date; that he held possession of the upper story until after the secretaries were put in place.

In our opinion, there are two facts shown by all the evidence of both parties, and concerning which there was at the trial no dispute, which are fatal to appellant's claim against respondents, the sureties, to wit:

1. That the weekly payments of nine hundred dollars each were not paid as agreed.
2. That the amount due in excess of ten thousand eight hundred dollars was not all retained until the completion of the contract.

Failure to do both was a substantial violation of the contract on the part of appellant.

And if appellant requested and permitted changes to be made without previously agreeing upon the price of the same, or referring it to arbitrators, that, too, was a violation which was material. If we are correct in our conclusions, it is unnecessary to examine the instructions given at the request of the sureties. A judgment will not be reversed when it is apparent that the verdict would have been the same with correct instructions, and when the court below could not have refused to grant a new trial had the verdict been for the opposite party. The eighth, ninth, tenth, and eleventh instructions are correct, and they cover the principles upon which we base our decision.

Opinion of Beatty, C. J., concurring and dissenting.

The law is too well settled to require argument or authorities in its support, that the liability of a surety can not be changed without his consent, even though such change is advantageous to him. The following authorities sustain the principle stated, and are applicable to the present case: *Quillan v. Arnold*, 12 Nev. 238; *Bragg v. Shain*, 49 Cal. 134; *Miller v. Stewart*, 9 Wheat. 704; *United States v. Howell*, 4 Wash. (C. C. R.) 620; *Calvert v. London Dock Co.* 2 Keen, 639; *Burge on Suretyship*, 46, 53, 115, 118.

For the errors before mentioned affecting appellant's rights as regards respondents Wood & Richards, the judgment as to them is reversed and the cause remanded. As to respondents, the sureties, judgment is affirmed.

HAWLEY, J., concurring and dissenting.

I concur in the judgment of affirmance as to the sureties.

As to the respondents Woods & Richards, there is no settled or agreed statement on motion for a new trial, and hence nothing properly before us but the judgment roll. (*Lockwood v. Marsh*, 3 Nev. 138; *White v. White*, 6 Id. 20.)

In my opinion the objection to the statement is not one that is required, under rule 8, to be "noted in writing and filed at least one day before the argument," and although the objection was not made in the oral argument, it is made in the written brief that was filed within the time given by the court. This, it seems to me, is not a waiver of the objection.

As no error appears in the judgment roll, I think that, under the previous rulings of this court, the judgment of the district court ought to be affirmed.

BEATTY, C. J., concurring and dissenting.

I concur in the opinion of Justice Leonard that counsel for respondents, Wood & Richards, by arguing this appeal on its merits, waived the objections which they afterwards made to the transcript, and I concur in his opinion that as to them the judgment should be reversed. But I think the judgment as to the sureties ought also to be reversed. The instructions given to the jury, at their request, were, in my

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opinion, erroneous, and as the statement does not purport to contain all the evidence, it cannot be said to establish any fact so conclusively in favor of the sureties as to render the error in the instruction immaterial.

[No. 990.]

EX PARTE PHILIPP DEIDESHEIMER.

RIGHTS OF STOCKHOLDERS—DUTY OF SUPERINTENDENT—STATUTE CONSTRUED.—In construing the provisions of the act to protect the rights of stockholders in the mines of this state (Stat. 1877, 80; Stat. 1879, 57): *Held*, that the superintendent can not be held guilty of a misdemeanor for refusing to permit the qualified stockholders to examine the mine.

IDEM—PENAL STATUTE.—Penal laws should be plainly written, so that every one may know with certainty what acts or omissions constitute the crime

HABEAS CORPUS. The facts appear in the opinion.

B. C. Whitman and C. J. Hillyer, for Petitioner.

Stone & Hiles, Seeley & Woodburn, and M. A. Murphy, Attorney-General for the State.

By the Court, LEONARD, J.:

The petitioner, Philipp Deidesheimer, is brought before me in chambers on *habeas corpus*, with a return showing he was arrested and is detained under a warrant of arrest issued by Thomas Moses, justice of the peace of Township No. 1, in Storey county, by James Jewell, constable of said township. There is no dispute as to the facts, which are as follows:

On the twenty-eighth day of July, 1879, the petitioner was the duly qualified and acting superintendent of the Hale and Norcross Mining Company, a foreign corporation incorporated for the purpose of working upon and mining in the Comstock lode, in Storey county, and on that day A. B. Thompson, who, as owner and agent, was possessed of one fifth of one per cent. of the original capital stock of

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said corporation, applied to said justice, under and in accordance with the provisions of section 1 of the statute hereafter noticed, found on page 57, statutes of 1879, for an order to examine the shafts, adits and hoisting works of the mine of said corporation. Thereupon the justice delivered to Thompson an order directed to petitioner as superintendent, commanding him "to admit Thompson into said mine and permit him to examine fully all parts of the shafts, adits, borings, drifts, stopes, winzes, hoisting apparatus and every and all properties and appurtenances belonging to said mining company." Thereafter, on said day, Thompson presented the order to petitioner at the mine of the company, and demanded to be admitted. Petitioner then and there refused to comply with the order, or any part thereof. At the time of the application and refusal just mentioned, there was posted in a conspicuous place at the mine, a notice, of which the following is a copy:

"VIRGINIA, NEVADA—NOTICE! In compliance with the provisions of the act of the legislature of the state of Nevada, touching the examination of mines, etc., Monday is named as the day of the week in which authorized stockholders may be admitted under the provisions of said act.

"PHILIPP DEIDESHEIMER, Sup't."

It is admitted that petitioner complied with the law in relation to posting notice.

A complaint upon oath was thereupon laid before the justice, charging petitioner with the crime of refusing him, the said Thompson, admittance to the underground works and mine of the Hale and Norcross Mining Company, upon the Comstock lode, in Storey county, Nevada, contrary to the provisions of an act of the legislature of the state of Nevada, entitled "An act to amend an act, entitled 'An act to protect the rights of owners of stock shares and other interests in the mineral and metal-yielding mines of this state.' Approved February 21, 1877." A warrant of arrest was issued and placed in the hands of the constable, who arrested petitioner, and he is now detained under said writ. The warrant is conceded to

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be in due form; but it is alleged in the petition, and claimed by counsel for petitioner, that such warrant was and is without authority of law.

It is said by counsel for the state, that if petitioner is discharged, the order therefor must be based upon some one or more of the grounds set out in section 20 of the habeas corpus act (Stat. 1862, p. 100); that he must bring his case within either or both of subdivisions fourth and sixth of such section, which provide that the petitioner may be discharged. * * * "Fourth—When the process, though proper in form, has been issued in a case not allowed by law." * * * "Sixth—Where the process is not authorized by any judgment, order or decree of any court, nor by any provision of law."

As I view the case, it may be decided by asking and answering the question submitted by counsel for the state as the main one in controversy, to wit: "Was this warrant issued in a case allowed by law, or is the process authorized by any provision of law?"

The original statute, entitled "An act to protect the rights of owners of stock shares and other interests in the mineral and metal-yielding mines of this state," was passed and approved in 1877. (Stat. 1877, p. 80.)

In 1879, section 1 of the statute just referred to was amended, but section 5 was not amended or re-enacted.

It is urged by counsel for petitioner, that section 5 of the statute of 1877 only attaches to a violation of the provisions or conditions of section 1 of that act, and that it does not attach or apply to a violation of the provisions or conditions of section 1, as amended in 1879. In my opinion section 1 as amended, and section 5 in the original act, must be construed together, as though the former had been incorporated in the prior act at the time of its adoption. (*Holbrook v. Nicholl*, 36 Ill. 161; *McKibben v. Lester*, 9 Ohio St. 621; *Sedgwick on the Construction Stat. Law*, 68.)

For the purposes of this case, section 1 of the statute of 1879, and section 5 of the statute of 1877, may be epitomized as follows:

"Section 1. Any person being the *bona fide* owner of one

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fifth of one per cent. of the original capital stock of any company incorporated for the purpose of working upon and mining in any lode * * * of precious or useful metals in this state, and any number of persons being the *bona fide* owners, in the aggregate, of such amount of stock, at the time application for a permit to examine any such mine shall be made, such owner or owners, upon a written order from the county clerk or justice of the peace, * * * shall be entitled to the privilege of fully examining all of the shafts, adits, borings, drifts, stopes, hoisting apparatus, and every and all properties and appurtenances belonging to such mining company; *provided*, that not more than one owner of said percentage or aggregate percentages of such mining stock shall, either in person or by agent, be entitled to such order * * * oftener than twice in one month; these days shall not be *more than fourteen nor less than fifteen days apart*. *It shall be the duty of the superintendent or other person or parties in charge of any incorporated mining claim * * * to keep posted in some conspicuous place at or near the mine, the day of the week in which authorized stockholders may be admitted under the provisions of this act.*"

"Sec. 5. Any mining superintendent, or mining foreman, or mining secretary, of any incorporated mining company in this state, acting under and for such mining company, *who shall fail or refuse to comply with any of the conditions mentioned in section 1 of this act, shall, for each and every such failure or refusal, be deemed guilty of a misdemeanor,*" etc.

It is claimed on the part of petitioner that the only condition or duty imposed upon him is that he shall post the notice, and that, inasmuch as he did that, he is guilty of no crime under the statute, either by neglect or refusal; that, in addition, the first section is only a declaration of the rights of certain stockholders, and that if those rights are infringed the remedy is against the company and not the superintendent. In a word, it is claimed that the superintendent has not violated any of the conditions or provisions of section 1. On the other hand it is urged by counsel for the state, that the "conditions" referred to in the fifth section are the performance of two obligations or duties

by the superintendent, viz: First, to post the notice, which is required in express terms; and, second, to admit the stockholders, which is required by necessary implication.

The last part of section 1, in relation to posting the notice, may be disregarded; because, if that is the "condition" intended in section 5, it is admitted that petitioner has fully complied therewith. I have nothing to do with the policy of the law under examination. My duty is limited to a consideration of the question whether or not the petitioner is unlawfully restrained of his liberty, under and by virtue of the warrant of arrest above mentioned; and the solution of this question for or against him depends entirely upon the conclusion arrived at in answer to the further inquiry: Was his refusal to admit Thompson a violation of any of the conditions or provisions of section 1? In other words, is it a provision or condition of section 1 that the superintendent in charge shall admit the qualified stockholders?

As before stated, it is admitted by counsel for the state, that if the admission of qualified stockholders by the superintendent is one of the "conditions" referred to in section 5, it becomes so by necessary implication rather than by express words. And if such admission is a plain duty which the superintendent can not fail or refuse to perform without being guilty of a misdemeanor, it becomes so only by reason of the declaration that "such owner or owners * * * shall be entitled to the privilege of fully examining all the shafts * * * and every and all properties and appurtenances belonging to any such mining company."

The statute makes the posting of notice the superintendent's plain duty; but he is not commanded to admit stockholders, nor is he in terms forbidden to refuse admission. Penal laws generally prescribe what shall or shall not be done, and then declare the consequences of a violation of either requirement.

They should be plainly written, so that every person may know with certainty what acts or omissions constitute the

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Crime. (Bish. on Stat. Crimes, sec. 193; Beccaria on crimes, 22, 45; *The Schooner Enterprise*, 1 Paine, 33.

Beccaria says: "I do not know of any exception to this general axiom, that every member of the society should know when he is a criminal and when innocent." (45.)

"There is nothing more dangerous than the common axiom, the spirit of the laws is to be considered. To adopt it is to give way to the torrent of opinions. This may seem a paradox to vulgar minds, which are more strongly affected by the smallest disorder before their eyes, than by the most pernicious, though remote, consequences produced by one false principle adopted by a nation. Our knowledge is in proportion to the number of our ideas. The more complex these are, the greater is the variety of positions in which they may be considered. Every man hath his own particular point of view, and at different times sees the same objects in very different lights. The spirit of the laws will then be the result of the good or bad logic of the judge; and this will depend on his good or bad digestion; on the violence of his passions; on the rank and condition of the accused; or on his connection with the judge; and on all those circumstances which change the appearance of objects in the fluctuating mind of man. Hence we see the fate of a delinquent changed many times in passing through the different courts of judicature, and his life and liberty victims to the false ideas or ill humor of the judge, who mistakes the vague result of his own confused reasoning for the just interpretation of the laws. We see the same crimes punished in a different manner at different times in the same tribunals; the consequence of not having consulted the constant and invariable voice of the laws, but the erring instability of arbitrary interpretation." (22.)

In the case of the schooner *Enterprise*, Mr. Justice Livingston used the following language: "The act, and particularly that part of it under which a forfeiture is claimed, is highly penal, and must therefore be construed as such laws always have been and ever should be. But while it is said that penal statutes are to receive a strict

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construction, nothing more is meant than that they shall not, by what may be thought their spirit of equity, be extended to offenses other than those which are specially and clearly described and provided for. A court is not, therefore, as the appellant supposes, precluded from inquiring into the intention of the legislature. However clearly a law be expressed, this must ever, more or less, be a matter of inquiry. A court is not, however, permitted to arrive at this intention by mere conjecture, but it is to collect it from the object which the legislature had in view and the expressions used, which should be competent and proper to apprise the community at large of the rule which it is intended to prescribe for their government." * * * "If it be the duty of a jury to acquit where such doubts exist concerning a fact, it is equally incumbent on a judge not to apply the law to a case where he labors under the same uncertainty as to the meaning of the legislature." * * * "The attention of the court has been called to a history of the progress of the several laws relating to the embargo, and to the mischiefs which were unprovided for, at the time of the passage of the one under consideration, in order to show what was intended by the legislature. Almost every possible evasion, it is said, had been previously guarded against by adequate sanctions, except that of loading clandestinely or by night, and then watching an opportunity of going to sea without a clearance or giving bonds, which was the evil to which it was intended to apply a remedy. Be it so. This may have been in the contemplation of congress, but we are not bound to conclude that they have done what was intended, unless fit words be used for the purpose."

And in the *United States v. Wiltberger* (opinion by Chief Justice Marshall) the court says: "It has been said that although penal laws are to be construed strictly, the intention of the legislature must govern in their construction. That if a case be within the intention, it must be considered within the letter of the statute. So if it be within the reason of the statute. The rule that penal laws are to be construed strictly is perhaps not much less old than construction

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itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime and ordain its punishment. * * The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed which would justify a court in departing from the plain meaning of the words, especially in a penal act, in search of an intention which the words themselves do not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so." (See, also, Sedgwick on the Construction of Stat. and Const. Law, 279, *et seq.*; Smith's Commentaries, sec. 746; Bish. on Stat. Crimes, sec. 192, *et seq.*)

In *Jones v. Smart*, 1 T. R. 52, Butler, justice, says: "We are bound to take an act of parliament as they have made it; a *casus omissus* can in no case be supplied by a court of law, for that would be to make laws."

Mr. Dwarries says: "The result is, that to bring a case within the statute, it should be, not only within the mischief contemplated by the legislature, but also within the plain, intelligible import of the words of the act of parliament." (Dwarries on Statutes, 711.)

That such should be, and is, the fundamental rule in relation to penal statutes admits of no doubt. Nor are the cases cited by counsel for the state in any manner opposed to the rules stated above. (See *United States v. Winn*, 3 Sumner, 209; *The Emily and The Caroline*, 9 Wheat. 381.)

There can be no better example of the great danger of resorting to implications in order to find that a crime has been committed than the argument of counsel for the state in this case. They say: "There are many acts, in connection with the visit of the stockholders to the mine, which the statute only impliedly makes it the duty of the superintendent to perform. As for example: To furnish the stockholder with the machinery and appliances usually had and used in and about the mine for ascending and descend-

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ing the shaft, and, if necessary, to furnish him with a proper guide to assist him in examining the shafts, adits, borings, drifts, slopes, hoisting apparatus, and every and all properties and appurtenances belonging to such mining company; and if he should fail or refuse to perform such acts, he would be violating the statute, although the doing of such acts is not enjoined upon him by the express terms of the act."

I do not intend to intimate whether it would be the superintendent's duty to furnish any or all the means of examination suggested by counsel, if it be true that in a criminal case implied duties may be multiplied, as counsel claim. This argument is referred to, only to show the danger of finding a statutory crime where the words do not plainly authorize it. If counsel are correct, what superintendent could ever know when he is within or without the statute? One stockholder might demand one thing and another something else. If the superintendent must furnish a guide, although nothing is said about it in the law, why should he not, with equal propriety, be required to furnish rubber coats and boots, if the mine is wet, and such articles are used in the mine?

If he cannot go to the law and there find what is required of him, or what he is prohibited from doing, his only safe course would be to comply with every request made; for should he fail or refuse to comply, if counsel are correct, it might be decided that he refused to perform an implied duty, which is one of the conditions of section 1. Suppose we had this statute in substance:

SECTION 1. Every county assessor, before making an assessment, shall be entitled to the privilege of examining the books of all firms, corporations and individuals selling merchandise within his county.

SEC. 2. Any person having charge of such business, whether principal, agent or superintendent, who shall fail or refuse to comply with the conditions of section 1, shall be deemed guilty of a misdemeanor and be punished, etc.

Under that statute, the assessor goes to a Chinese corporation selling merchandise, and demands of the person in charge the privilege of examining the books. They are

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produced, but are kept in the Chinese language. The assessor, being unable to understand the Chinese method of bookkeeping, demands an interpreter, upon the ground that it is an implied duty on the part of the corporation to furnish one.

Even admitting that implied duties or prohibitions, within reasonable limits, may be considered in relation to penal statutes, in my opinion it is not such duty to furnish a guide in the one place or an interpreter in the other. But other judges might think otherwise, and thus we see some of the evils liable to arise from an equitable, rather than a strict, construction of penal statutes—some of the evils so vividly portrayed by Beccaria—thus we see that superintendents would be in continual doubt as to their duties, and, consequently, would not know with certainty when they could with impunity refuse a stockholder's request. The legislature may have intended to require of the superintendent all that is claimed by counsel for the state; but if such was the intention, they failed to use any fit words expressing the same. In their absence I am unable to arrive at the conclusion that the petitioner committed any offense in refusing to admit the complainant to the Hale & Norcross mine and works. It follows that he is detained without authority of law and must be discharged. I am permitted to add, that in the above construction of the statutes referred to, my associates fully concur. The petitioner is discharged.

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[No. 970.]

A. L. GREELEY, RESPONDENT, v. DANIEL HOLLAND,
APPELLANT.

TRANSCRIPT ON APPEAL—WHAT PAPERS AND DOCUMENTS SHOULD BE STRICKEN OUT.—The minutes of the court and all other matters not embraced in the statement on appeal, judgment-roll, or authenticated as by law required, should, on motion, be stricken from the transcript on appeal.

ELECTION CONTEST—SUFFICIENCY OF COMPLAINT.—*Held*, that the complaint, tested either by sections 4 and 5 of the *quo warranto* act (1 C. L. 392, 393), or by section 40 of the election law (2 C. L. 2543) is sufficient.

Statement of Facts.

STATEMENT NOT CONTAINING ALL THE EVIDENCE.—When the statement on appeal does not purport to contain all the evidence: *Held*, that this court is bound to presume that there was evidence sufficient to sustain the findings of the court.

APPEAL from the District Court of the Eighth Judicial District, Esmeralda county.

The complaint in this case alleged, among other things, that plaintiff is a citizen of the United States, a resident of Esmeralda county, and eligible to the office of district attorney; that at the general election held on the fifth day of November, 1878, plaintiff and defendant were candidates for the office of district attorney; that the plaintiff received the highest number of legal votes and was duly elected to said office; that against the protest of plaintiff, the board of county commissioners, sitting and acting as a board of election canvassers, declared the defendant, Holland, elected, and directed and caused the clerk of said county to make out and deliver to said Holland a certificate of his election; that said board of commissioners canvassed and counted for plaintiff four hundred and fourteen votes, which the plaintiff received, all of which, except fifteen votes, were legal; that said board canvassed and allowed the defendant four hundred and twenty-seven votes, one hundred and nineteen of which were illegal; that at election precinct No. 17, at Candelaria, there were polled one hundred and thirty-four votes, one hundred and nineteen of which were polled and counted for defendant, and fifteen of which were polled and counted for plaintiff, and that all of said votes were illegal and should not have been cast, or polled, or canvassed for the reasons: First, the said voters were not legally registered; second, no list of the voters of said precinct was posted as required by law, and no opportunity was given to challenge or object to such persons as voters; third, no list of the persons registered in said precinct was prepared, or posted, or distributed, as required by law; fourth, no notice of the time for receiving objections to the right to vote was given as required by law; fifth, no copy of the register was ever made by any person authorized to

Argument for Appellant.

make the same, or delivered to the inspectors of election as required by law; that the votes polled at said election precinct, at said election, were illegal and fraudulent, and ought not to have been polled, or counted, or canvassed, because fraud and intimidation were resorted to and used in behalf of said defendant, and the voters were improperly influenced and coerced to cast their votes for said defendant by persons acting in his interest and on his behalf.

D. J. Lewis, for Appellant.

I. The complaint is insufficient. The alleged illegality consists of mere irregularity without fraud. (*Skerrett's case*, 2 Parsons, 509; *Brightly Election Cases*, 320; 2 C. L. 2535.)

II. If the requirements of the statute have not been substantially complied with, a contest may be instituted by any qualified elector of the district in the manner and for the causes specified in sections 2540, 2541, 2542, *et seq.*, C. L. Such contests are public matter and cannot by any intendment of law degenerate into a mere personal matter between individuals or claimants. (*Searcy v. Grow*, 15 Cal. 117.)

III. When a charge of fraud is relied on, it is incumbent on the contestant to show that an illegal act has been purposely committed, and that an evil result has flowed therefrom; or that an illegal vote has been purposely and unjustly received by the officers of election; or that a false estimate has been imposed on the public as a genuine canvass. (*Brightly's Election Cases*, 423, 432, cites *People v. Cook*, 8 N. Y. 67.)

IV. If there was a registry agent *de facto* or *de jure* in precinct No. 17, the proof of posting notices of time and place, of receiving objections, etc., to voters, is aided by the legal presumption that the officer did his duty in a legal manner. (*Broom's Leg. Max.* 945, 946, *ubi supra*, *Egery v. Buchanan*, 5 Cal. 53.)

V. Gross irregularities not amounting to fraud do not vitiate an election. (5 Abb. U. S. Dig. New Ser. 304, n. 25, cites *Morris v. Vanlaningham*, 11 Kan. 269; *People v.*

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Cook, 8 N. Y. cited in *Bright. Elec. Cases*, 423; *Littlefield v. Green*, *Bright. Elec. Cases*, 493, cites 1 *Chicago Leg. New S.* 330; *McCrary Elec. Law*, sec. 304 and cases cited.)

T. W. W. Davies and *A. C. Ellis*, also, for Appellant.

M. A. Murphy, *Robert M. Clarke*, and *N. Soederberg*, for Respondent.

By the Court, HAWLEY, J.:

Upon the oral argument in this case, on motion of respondent, the minutes of the district court, affidavit for continuance, bill of exceptions with the exhibits attached thereto, and all other matters not embraced in the so-called statement on appeal, judgment-roll, or authenticated as by law required, were stricken from the transcript on appeal.

The minutes of the court, affidavit for continuance, and some other matters, were stricken out because they were not embodied in the statement on appeal.

The minutes of the court, having been stricken out, can not be considered, and there is nothing left in the record to show that the bill of exceptions was filed within the time required by law.

A motion was also made to strike out the statement on appeal. This motion ought, perhaps, also to prevail.

The statement has no formal beginning or ending. It is difficult to tell, as counsel claim, "where the statement begins or what the judge certifies to as being correct."

If the certificate applies to all matters included in the transcript, which are contained in the so-called statement, still the other objection exists that it does not affirmatively appear that the statement was ever "served upon the adverse party," as required by section 332 of the civil practice act (1 *Comp. Laws*, 1393.) But, without deciding this motion, it is enough to say that the statement does not authorize a reversal of the judgment.

The complaint, tested either by sections 4 and 5 of the quo warranto act (1 *Comp. Laws*, 392-3) or by section 40 of the election law (2 *Comp. Laws*, 2543) is clearly sufficient. And, inasmuch as the court found that all the material allega-

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tions of the complaint are true, and that there was such irregularity in the receiving of the votes at Candelaria precinct as amounted to malconduct on the part of the board of inspectors, and inasmuch as the so-called statement does not purport to contain all the evidence, we are bound to presume that there was evidence submitted sufficient to sustain the findings of the court.

The judgment of the district court is affirmed.

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[No. 949.]

MAHER AND TOUSIGNANT, RESPONDENTS, v. S. T.
SWIFT, APPELLANT.

SALE OF PERSONAL PROPERTY MADE TO HINDER, DELAY, AND DEFRAUD CREDITORS—FRAUDULENT GRANTORS CAN NOT RELY UPON THEIR OWN FRAUD.—M. and T., being indebted to divers persons, made, executed, and delivered to B. a bill of sale of certain personal property, for the purpose of hindering, delaying, and defrauding their creditors, and thereafter allowed B. to have an equivocal possession of the property and to hold himself out to the world as the true owner. E., a creditor of B., levied upon the property: *Held*, That the original transfer of the property to B., though fraudulent as to the creditors of M. and T., was valid between M. and T. and B.; that the bill of sale vested the legal title in B., and that the property was thereafter liable to be seized as his property at the instance of his creditors; and that M. and T. could not set up their own fraud in order to defeat the rights of such creditors.

IDEM—SURRENDER OF BILL OF SALE.—The bill of sale was surrendered, and the property delivered by B. to M. and T. prior to the levy by E.: *Held*, That such surrender and delivery did not defeat E.'s rights as a creditor of B. Such surrender and delivery having been made without any valid consideration.

IDEM—ADMISSIBILITY OF EVIDENCE.—The court excluded a sworn complaint made by B. after the transfer to him, that he was the absolute owner of the property, it being shown by the testimony of M. that he knew of, and consented to, B's filing the complaint: *Held*, error.

IDEM.—The court excluded the conversations and declarations of B. to divers parties, that he was the owner of the property: *Held*, error.

ERRORS AGAINST RESPONDENT CAN NOT BE CONSIDERED.—The supreme court will only consider such questions as are assigned as error by appellant.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts are sufficiently stated in the opinion.

Wells & Stewart and A. C. Ellis, for Appellant.

I. The court erred in excluding defendant's questions to the witnesses Bovard, Stadtmuller, Hoover and others, to the effect that Bovard claimed the property as his own.

II. The court erred in excluding the sworn complaint of the witness Bovard against S. T. Swift, defendant, for a portion of the property in controversy. (*Gallagher v. Williamson*, 23 Cal. 331; 12 Nev. 38; 7 Cal. 391; 8 Id. 109; 12 Pick. 89 and 306.)

III. The court erred in excluding the following questions put to witness Elder by the defendant, upon the plaintiff's objection, to wit:

"Were you told by any one, before the levy of the execution in the case of Bovard against Elder, that Maher, plaintiff in the case, had stated that the property in controversy, or any part thereof, was the property of Bovard, the execution debtor?" (*Mitchell v. Reed*, 9 Cal. 204; *Goodale v. Scannell*, 8 Id. 27; *Chapman v. O'Brien*, 34 N. Y. Sup. Ct. 524; *Horn v. Cole*, 51 N. H. 287; *Stevens v. Dennett*, Id. 324.)

Robert M. Clarke and N. Soederberg, for Respondents.

I. The facts pleaded and sought to be proved were insufficient to establish an equitable estoppel. (*Sharon v. Minnock*, 6 Nev. 386; *Ward v. Carson Riv. Wood Co.* 13 Nev. 44; *Bigelow on Estoppel*, 480-600; 4 Saw. 17; 55 N. Y. 229; 14 Cal. 368; 109 Mass. 57.)

II. The conduct of plaintiff upon the seizure of his property by the sheriff, was properly allowed in evidence. (1 Green. Ev. sec. 108.)

III. There was no judgment ever entered by the court in the case of *Bovard v. Elder*, and hence the execution under which defendant attempted to justify was a nullity.

By the Court, HAWLEY, J.:

This action was brought to recover twenty-six animals (horses and mules), seven wood wagons, and other personal property connected therewith, or the value thereof.

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The defendant, Swift, in his official capacity as sheriff of Ormsby county, levied upon, took possession of, and sold the property by virtue of a writ of execution in favor of George S. Elder, in the suit of *C. M. Bovard v. George S. Elder*, as the property of said Bovard.

Plaintiffs obtained judgment. Defendant appeals.

The testimony is quite voluminous, and is, in several particulars, somewhat conflicting and very unsatisfactory.

The property in controversy was purchased by the plaintiffs from different parties, mostly on credit, prior to the thirty-first day of October, 1877.

A portion of the property—"eight animals, four wagons and twelve harness"—was purchased from C. M. Bovard for the sum of one thousand dollars. Two notes of five hundred dollars each were given to Bovard—one became due in September and the other in October, 1877. The note that became due in September was paid. The other was not.

On the thirty-first day of October, 1877, the plaintiffs agreed with C. M. Bovard that the property purchased from him should be returned; that he should become the owner of the property, and should pay to plaintiffs five hundred dollars and surrender their note for the other. Bovard then paid one thousand dollars to Maher & Tousignant. M. & T. paid back to Bovard the sum of five hundred dollars, and Bovard surrendered the unpaid note to M. & T. The plaintiffs thereupon executed and delivered to said Bovard a bill of sale for "thirty-two head of animals, six wood wagons, a kit of blacksmith tools, and harness for the thirty-two animals."

This bill of sale was executed for the purpose of avoiding anticipated trouble with one James Mayberry, on account of the plaintiff's failure to complete a contract with him for hauling wood. Maher, in his testimony, says: "We hadn't finished our contract; * * * we wanted to get a settlement out of Mayberry, and we were afraid he would take the stock for damages, because the contract wasn't finished. Therefore, we executed this bill of sale to save ourselves. That is what it was given for." In the course

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of his testimony, he admitted that the object in executing the bill of sale was to prevent Mayberry from getting the property, if he had any claim against them for not completing their contract.

Bovard, in his testimony relating to the same transaction, says: "The property described in the bill of sale * * * was got from Lufkins, Perry, and Hager. I had no interest in this property before this bill of sale had been made; never had any interest in it before. I had no interest with the plaintiffs * * * in hauling wood or freighting wood for Mayberry. The bill of sale was made because they thought that Mayberry would probably attach their stock and prevent them from taking it out of there on account of their not fulfilling their contract. * * * They gave me that bill of sale and I gave Mr. Tousignant one thousand dollars. * * * Mr. Maher and Mr. Boyd were called in as witnesses. Then Maher and I went out into a little office they had there and he gave me back the money, and I took it in, and I counted the money over to Mr. Maher, the same one thousand dollars, and gave it to him, and he gave it to Mr. Tousignant. * * * No other consideration or thing passed between me and these people for the property, except as I have stated." It does not appear from the record on appeal that Mayberry ever made any demand against the plaintiffs; that he ever brought any suit or obtained any judgment against them.

The jury, upon special issues submitted to them, found that Bovard did not, at any time, after the execution and delivery of the bill of sale, have the entire and exclusive possession and control of the property mentioned therein; that in the month of November, 1877, it was agreed between the parties that Bovard should have the use and possession of the property in question and receive the earnings of the same until the amount of one thousand dollars was realized, over and above expenses, and that then the Bovard property, to wit, "eight animals, four wagons, and harness," should belong to the plaintiffs; that Bovard, while using the property, was unable to pay the expenses of the same; that on the twenty-ninth of January,

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A. D. 1878, the plaintiffs and Bovard had a full and final settlement; that the plaintiffs executed and delivered to Mrs. Bovard, at the instance of the said C. M. Bovard, their notes for the sum of one thousand dollars, originally due to said Bovard for the purchase of the property, and the additional amount of two hundred and fifty-seven dollars and ten cents, the expenses incurred by Bovard while using the property; that Bovard thereupon surrendered and delivered to plaintiffs the bill of sale; that after the twenty-third day of December, 1877, the plaintiffs had the exclusive possession, use and control of the property, up to and including the fourth day of February, 1878, when the defendant levied upon and took possession of the same as the property of C. M. Bovard; that the plaintiff, Maher, after the month of November, 1877, "and previous to the levying of the execution, declared to two or more persons, not in confidence, that the property in controversy belonged to C. M. Bovard."

The majority of the members of this court entertain the opinion that the facts of this case bring it directly within the legal principles decided in *Allison v. Hagan*, 12 Nev. 38.

The record contains abundant evidence to show that at the time of the fraudulent transfer of the property to Bovard the plaintiffs were indebted to divers persons; that after that transaction occurred they allowed Bovard to have, at least, an equivocal possession of the property, and to hold himself out to the world as the true owner. They at divers times asserted, for the purpose of misleading their creditors and preventing them from attacking, that Bovard was the owner of the property.

Between the first and fifteenth of December, 1877, a member of the firm of Stadtmuller & Co., at Empire, called upon the plaintiff Maher and requested payment of the amount that Maher owed the firm. Maher represented to him "that Bovard owned everything, teams and wagons and all; that he had sold everything to Bovard."

On the twentieth of December, 1877, M. C. Tilden brought suit against Maher & Tousignant and attached part of the property in controversy in this suit. After the attachment

was levied Maher told Tilden that he did not own the property, and that it belonged to Mr. Bovard.

The bill of sale was always exhibited and used, or attempted to be used, as a cloak to hide the truth from their creditors.

The evidence which was admitted at the trial tends very strongly to show, if it does not clearly establish the fact, that the plaintiffs and Bovard acted in concert for the purpose of shielding each other from the legal rights of their lawful creditors. When any creditor of the plaintiffs sought to obtain a lien upon the property, Bovard claimed it, and the plaintiffs said it belonged to him. When the creditor of Bovard seeks to obtain a lien upon it as the property of Bovard, then the claim is made that it belongs to the plaintiffs, and Tousignant declares that "it was pretty hard for his property to go to pay another man's debts." Bovard also says that the property belongs to the plaintiffs. It then appears that the ubiquitous bill of sale, after having served its fraudulent purpose in one case and failed so to do in another, had been voluntarily surrendered up to the plaintiffs, so that they might exhibit it for the fraudulent purpose of frightening another class of creditors, for the payment of whose debts the property had in the mean time become liable. In brief, the fraudulent purpose of the whole transaction, from beginning to end, is exposed to view upon nearly every page of a very voluminous record.

The original transfer of the property to Bovard, though fraudulent as to the creditors of Maher & Tousignant, was perfectly valid as between the parties to the bill of sale. It vested the legal title in Bovard. The property was thereafter liable to be seized as his property at the instance of any of his creditors. The plaintiffs can not set up their own fraud in order to defeat the rights of such creditors. Having made their bed in fraud, there they must lie. The aid of a court of justice can not be invoked to relieve them from their own iniquity. In order to establish their rights they must show that the justice of their case comes from a pure fountain. The law endeavors to environ every debtor who engages in transactions of this character with all pos-

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sible perils and, by its stern mandate, seeks to enforce upon his mind that, in weal or woe, "honesty is the best policy."

The bill of sale having been surrendered, and the property delivered by Bovard to the plaintiffs prior to the levy of the execution, will not defeat Elder's rights as a creditor of Bovard, such surrender and delivery having been made, as is clearly shown by the testimony, without any valid consideration.

Entertaining these views, it necessarily follows that the court below erred in several particulars.

The action of the court in giving and refusing certain instructions was at variance with the views herein expressed, and directly in conflict with the principle of law, as stated by this court, in the case of *Allison v. Hagan*, as will readily be seen by a mere recital thereof.

At the request of plaintiffs' counsel the court instructed the jury as follows: "The jury are instructed that if they believe from the evidence that prior to February 4, A. D. 1878, C. M. Bovard had a settlement with the plaintiff concerning all matters of difference between them concerning the property in question, and that prior to said fourth day of February, A. D. 1878, it was agreed between them that the property in question should belong to the plaintiffs, and that plaintiffs should have the use and control and possession of said property, and that the bill of sale of October 31, A. D. 1877, was surrendered by Bovard to the plaintiffs, and that at the time the defendant took the property said C. M. Bovard was not in the possession of the said property, and the plaintiffs were in the possession thereof, then the jury must find a verdict for the plaintiffs."

The defendant asked the court to instruct the jury as follows: "The jury are instructed that the return by Bovard to Tousignant of the bill of sale made by them to him, does not, of itself and alone, operate to convey to Maher & Tousignant any interest in the property in controversy." The court refused to give this instruction as asked; but modified and amended the same by adding thereto the words: "To operate as a conveyance the property must have been either in plaintiffs' possession, or delivered to them at the

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time of the return of the bill of sale, or at some time prior to the levy of the execution."

The court also erred in excluding the sworn complaint of the witness Bovard, filed December 22, 1877, wherein he swore, without any qualification, that he was the absolute owner of the property, it having been previously shown by the testimony of Maher that he (Maher) knew of and consented to Bovard's filing of that complaint.

The court erred in ruling out the conversation of Bovard with the witness Stadtmuller, to the effect that he (Bovard) owned the property, and that Stadtmuller & Co. might do the best they could to collect their debt of Maher & Tounsignant. The court erred in excluding the conversations and declarations of Bovard as to his ownership of the property, as made to the witness Hoover and other parties.

The testimony excluded by the court was admissible for the purpose of enabling the jury to arrive at the truth of the whole transaction. It tended materially to strengthen the position that there was a concert of action between the plaintiffs and Bovard to conceal the truth, and thereby defraud the creditors of the respective parties.

It was also admissible for another purpose. It tended to impeach the testimony of the witness Bovard, as given on the trial, to the effect that he held the property as security for the payment of the sum of one thousand dollars.

The views already expressed reach the merits of this controversy and render it unnecessary to examine or decide the question whether or not the court erred in excluding certain testimony tending to bring the facts of this case within the general rules of an equitable estoppel, as argued by the respective counsel.

One other question remains to be noticed. The suit of *Bovard v. Elder* was referred to a referee, who found the facts, conclusions of law, and reported a judgment in favor of Elder. The judgment in the record purports to be the judgment of the referee. It does not appear to have been entered by order of the court.

When the judgment-roll in that case was offered in evidence by the defendant, the proofs as to its correctness

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were expressly waived by the plaintiff's counsel; but they objected to its admission because it did not appear to have been entered by order of the court. The court below overruled the objection and admitted the judgment-roll in evidence. Respondents claim that this action of the court was erroneous.

Even if it was admitted that the court erred, it would not justify an affirmance of the judgment entered in this case. Appellant would have the right to offer the proofs upon another trial, and to show, if he could, that the judgment was entered by order of the court.

We might dispose of this question by simply saying that it is not properly before us for decision. We are only called upon to dispose of such questions as are assigned as error by the appellant. It is not the rule of appellate courts to look into the errors, if any, that may have been committed against the respondent. (*Jackson v. Feather River Water Co.* 14 Cal. 18; *Seward v. Malotte*, 15 Id. 304; *Paul v. Magee*, 18 Id. 698.) We deem it proper, however, to add that we are of the impression, from the cursory examination we have made, that it is not necessary to the validity of such a judgment that it should appear to have been entered by order of the court. (Civil Practice Act, sec. 189.) It will be time enough to decide the question when it is properly presented.

The judgment of the district court is reversed and the cause remanded for a new trial.

14 332
16 378

[No. 974.]

JAMES SIAS, PETITIONER, v. JAMES F. HALLOCK,
STATE CONTROLLER, RESPONDENT.

REWARD—STATUTE CONSTRUED.—In construing the statute authorizing and requiring the payment of rewards in certain cases (St. 1877, 92): *Held*, that it has no application to offenses committed against the United States and tried in the United States courts, but applies to persons who violate the state law, and who are arrested under process issued out of state courts, and who are therein convicted.

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IDEM.—The reward, provided for in the statute, must be paid to the person or persons making the arrest.

APPLICATION for mandamus.

The facts appear in the opinion.

Robert M. Clarke, for Petitioner.

A. C. Ellis, for A. L. Nuckols.

M. A. Murphy, Attorney-General, for Respondent.

I. A reward offered for the apprehension of a thief and money can not be claimed by a sheriff or constable, who arrests the thief, by virtue of a warrant delivered to him for that purpose. (12 Ohio, 281; 15 Wend. 44; 16 Minn. 408; *Smith v. Whildin*, 10 Pa. 39.)

II. A public officer can not receive, for performing an official duty, any other compensation or reward than that which is prescribed by law. (*Warner v. Grace*, 14 Minn. 487; *Day v. Putnam Ins. Co.* 16 Id. 408; *Hatch v. Mann*, 15 Wend. 44; *Gilmore v. Lewis*, 12 Ohio, 281.)

By the Court, LEONARD, J.:

This is an application by the petitioner, James Sias, for a writ of mandamus to compel respondent, the state controller, to draw his warrant on the state treasurer in favor of petitioner for the sum of five hundred dollars reward, claimed to be due for the arrest of Bell and Wilson, who were arrested by petitioner, and thereafter tried and convicted in the United States district court in and for the district of Nevada, for the crime of robbing the United States mails.

Petitioner bases his claim upon the following statute:

“The Governor shall offer a standing reward of two hundred and fifty dollars for the arrest of each person engaged in the robbery of, or in the attempt to rob, any person or persons upon; or having in charge in whole or in part, any stage coach, wagon, railroad train, or other conveyance, engaged at the time in conveying passengers, or any private conveyance within this state, or for the arrest of any person

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engaged in the robbery of, or in the attempt to rob, any person or persons upon any highway in the state of Nevada, the reward to be paid to the person or persons making the arrest, immediately upon the conviction of the person or persons so arrested; but no reward shall be paid except after such conviction." (Stat. 1877, p. 92.)

A. R. Nuckols also claims the reward, upon the ground that he gave information of the whereabouts of Bell and Wilson which led to their arrest, and hunted up the evidence upon which they were tried and convicted. The warrants under which Bell and Wilson were arrested were issued by United States commissioner J. H. Windle, at Elko, Nevada, upon the complaint of A. G. Sharp, special postal agent of the United States, who took the same to Eureka and delivered them to the petitioner, Sias. Petitioner was then a deputy marshal of the United States and sheriff of Eureka county. He received the warrants from Sharp and arrested Bell in Eureka. With the other warrant he went to White Pine county, and, at Hamilton, arrested Wilson. The prisoners were thereupon taken by him before commissioner Windle, at Elko. He made his returns upon the warrants under which the arrests were made, showing that he had arrested both Bell and Wilson under and by virtue of said warrants, as deputy United States marshal. It is also admitted that Nuckols was constable of the ninth township of White Pine county during the time of the performance of the services for which he claims the rewards in question. He lived at Cherry Creek, and in his affidavit he states that Bell and Wilson were at all times within his reach by telegraph, and that he had kept constant watch of their movements, with the full intention of arresting them and bringing them before the United States courts, having them under a shadow for more than two months, and that any subsequent arrest was nothing more than the execution of his plans and orders.

After the conviction of Bell and Wilson in the United States district court, for mail robbery, both the petitioner and Nuckols presented their claims in due form to the board of examiners of the state, each demanding two hun-

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dred and fifty dollars reward for the arrest and conviction of Bell, and the same sum for the arrest and conviction of Wilson, which claims were both acted upon and allowed by said board, and were afterwards certified and delivered to the respondent as state controller, who refused, and still refuses, to act upon either by drawing his warrant upon the state treasurer. In our opinion neither petitioner Sias nor Nuckols is entitled to receive the rewards mentioned in the statute quoted.

We have no doubt that the legislature only intended the payment of a reward for the arrest of any person who violates the state law in relation to robbery, and who is arrested under process issued out of state courts, and then only after conviction therein.

Bell and Wilson were arrested under a United States warrant and tried and convicted in a United States court, for an offense committed against the United States. For the arrest and conviction of persons guilty of robbing or attempting to rob the mails, the postal department offers and pays its own reward. When the legislature provided that "no reward shall be paid except after such conviction," a conviction in the state courts was referred to. There was no intention to aid the United States government in the arrest and conviction of its criminals.

In the act concerning crimes and punishments we frequently find these words, "and upon conviction thereof shall be punished," etc. For example: "Section 91. Every person who, by willful and corrupt perjury, * * * shall procure the conviction and execution of any innocent person shall be deemed and adjudged guilty of murder, and, upon conviction thereof, shall suffer the punishment of death." The same words may be found in nearly every section of the act. It would not be denied that they refer to a conviction in the state courts only, although such courts are not designated in terms. It is equally plain to our minds that the same construction should be placed upon the statute under which the rewards are claimed in this case. There is another reason why Nuckols is not entitled to receive any reward. It appears that the petitioner, Sias,

Argument for Petitioner.

arrested both Bell and Wilson. Nuckols does not claim to have arrested either. The reward offered, and the only one that could have been offered under the statute, was for the arrest of the persons named in the statute, and it can be paid for no other service. What Nuckols' rights would be as between him and the petitioner, if the latter was entitled to receive, and should receive, the reward claimed, we do not say. But so far as the state is concerned, no person can recover a reward, under the statute of 1877, without first showing that he made the arrest. By the very terms of the statute, the reward is "to be paid to the person or persons making the arrest, immediately upon the conviction of the person or persons so arrested." No reward is offered for searching out the persons accused, or for hunting up testimony against them, or for watching them lest they go away. (See *Gilmore v. Lewis*, 12 Ohio, 286.)

The writ is denied.

[No. 968.]

**JAMES MAYBERRY, PETITIONER, v. JOHN S. BOWKER,
RESPONDENT.**

MANDAMUS—SECTION 583 CIVIL PRACTICE ACT CONSTRUED—APPEAL—REMEDY AT LAW.—Petitioner applied by motion under section 583 Civil Practice Act (1 C. L. 1644) to the district court for an order requiring the justice of the peace before whom this cause was tried, to transmit to the district court the papers on appeal. The order was refused. Petitioner thereafter, upon the same state of facts, applied to this court for a writ of mandamus to compel the justice to transmit said papers to the district court. *Held*, that the order of the district court denying petitioner's motion was a final judgment in that proceeding, from which an appeal lies. (Beatty, C. J., dissenting.)

IDEM.—The writ of mandamus will not be issued in any case where petitioner has a plain, speedy and adequate remedy at law.

APPLICATION for mandamus.

The facts are stated in the opinion.

Boardman & Varian, for Petitioner.

I. The remedy by application to the district court is sub-

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stantially the same as an application for a mandamus. This court can not be deprived of a jurisdiction expressly conferred upon it by the Constitution. (*Levy v. English*, 4 Ark. 66.)

II. A writ of mandamus will be issued although petitioner may have some other remedy. (*State v. Wright*, 10 Nev. 175; *Jones v. McMahon*, 30 Tex. 730.

N. Soederberg, for Respondent.

Relator has another appropriate and adequate remedy. (1 C. L. 1544; *State v. McAuliffe*, 48 Mo. 112; High's Ex. Rem., sec. 243; 12 Barb. 220; 12 Nev. 105; *Adams v. Woods*, 18 Cal. 30.

By the Court, LEONARD, J.:

This is an original application in this court for a writ of mandamus, commanding respondent, a justice of the peace of Reno township, in Washoe county, to transmit to the clerk of the second judicial district court a copy of his docket, the pleadings and other papers filed in his court, in a cause tried therein, entitled *A. Charlebois v. James Mayberry*. Briefly stated, the facts are as follows: The plaintiff in the case just mentioned obtained judgment against the defendant therein for two hundred and fifty-nine dollars and his costs, taxed at thirty dollars and twenty-five cents. Defendant, Mayberry, duly appealed to the district court. He executed an undertaking not only to perfect the appeal, but to stay execution, in the sum of six hundred dollars, United States gold coin. One of the conditions of the undertaking was, that appellant would pay the amount of the judgment appealed from and all costs, if the appeal should be withdrawn or dismissed, or the amount of any judgment and all costs that might be recovered in the appellate court. Petitioner, Mayberry, paid to respondent, the justice of the peace, all court costs chargeable against him, besides two dollars, the statutory fees for making up and transmitting the transcript and papers on appeal, but refused to pay the plaintiff's court costs. Respondent, the justice, refused to transmit any of the papers to the district

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court until all his costs in the case were paid. Thereupon Mayberry applied by motion to the district court, under section 1644 C. L., for an order requiring the justice to transmit the papers to that court, but such order was refused, upon the ground that payment of all the fees due to the justice was a condition precedent to the right of demanding a transmission of any of the papers in the case to the appellate court. The application to the district court was made by motion based upon an affidavit containing the same facts as are set out in the petition for a writ of mandate in this court. After refusal of the district court to order the papers sent up, application was made to this court for the writ herein sought. An alternative writ was issued commanding respondent to show cause on the tenth day of March, 1879, at which time he appeared by counsel, and demurred to the affidavit or petition and writ, generally and specifically. Further hearing was postponed until March twentieth, when respondent made his return and filed his answer, stating that on the eighteenth day of March, 1879, in obedience to the alternative writ, he transmitted all the papers in said cause to the clerk of the district court, and denying that all the fees due from petitioner had been paid.

Counsel for petitioner thereupon moved that his costs in this court be taxed against respondent. In opposition to that motion it is urged, and we think correctly, that notwithstanding respondent did not transmit the papers until after the alternative writ was issued, still he should not be required to pay the costs, if it shall appear that a peremptory writ could not have been ordered. It is not claimed that this court could have ordered a mandamus directed to the judge of the second district court, commanding him to compel the justice to send up the papers after having acted judicially, by hearing and denying the motion made in that court. That would be against the whole current of decisions in this court and elsewhere. But it is said that the remedy provided by the practice act, and under which application for relief was made in the district court (C. L. 1644), is substantially the same as the one now made in this court, and that to give it the effect sought for by re-

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spondent is to deny to this court the exercise of a jurisdiction expressly conferred upon it by the constitution.

We need not decide whether the summary remedy provided by the statute just referred to would have deprived this or the district court of jurisdiction or power to order the issuance of the writ now asked, had application first been made for this writ, because that is not our case. Is petitioner now entitled to the writ? He is not, if at the time he made his application he had, or now has, another plain, speedy and adequate remedy in the ordinary course of law.

There is no dispute as to the facts, in this court, and it does not appear that there was any in the district court. There is only a difference of opinion as to the proper construction of a statute. All the facts necessary to enable the district court to decide, were embodied in an affidavit and filed in that court. The court denied the motion, for the reasons before stated, and the order denying the same was a final judgment in that proceeding, from which an appeal lies to this court, notwithstanding it be true that that proceeding was substantially the same as this. Such being the case, petitioner's proper remedy was an appeal instead of an application for mandamus. That remedy was open to him at the time this application was made, and it was plain, speedy, and adequate in the ordinary course of law. (*The Board of Commissioners, etc., v. Hicks*, 2 Carter, 530; *Marshall v. The State*, 1 Carter, 74; *The State ex rel. Reynolds v. The Board of Commissioners, etc.*, 45 Ind. 507; *Francisco v. M. I. Co.*, 36 Cal. 287; *High on Injunctions*, 148 *et seq.*; *State of Mo. ex rel. Wheeler v. McAuliffe*, 48 Mo. 115; *State of Mo. etc. v. Engleman, etc.*, 45 Mo. 27.)

We are of the opinion that petitioner should pay the costs, and it is so ordered.

BEATTY, C. J., dissenting.

The real objection to the petition in this case is not, in my opinion, that it shows that the petitioner has another plain, speedy, and adequate remedy, and therefore that he is not entitled to a writ of mandamus; but that it shows an-

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other action pending, or a former adjudication of the cause of action.

It may be true that the petitioner, by appealing from the order of the district court denying his application there, would ultimately obtain all the relief that his petition shows him to be entitled to; but, supposing that he appeals, and is successful in his appeal, all the relief he can ever obtain will be an order or mandate from the district court, enforceable by attachment for contempt, compelling the justice of the peace to send up the appeal papers. Such an order, no matter by what name it may be called, is nothing more nor less than the writ of mandamus which this court has original jurisdiction to issue (Constitution, Art. VI, sec. 4). The section of the statute (C. L. 1509), which implies that the writ of mandamus shall not issue in cases where there is a plain, speedy, and adequate remedy in the ordinary course of law, refers to remedies other and different from the writ of mandamus, and not to the case where, as here, a party has commenced one proceeding for a mandamus, and without prosecuting it to final judgment in the court of last resort, commences the same proceeding in another court of concurrent jurisdiction. In such a case, it can not be objected that the petitioner has another remedy, for in truth he has not. His only remedy is by mandamus, and all that can be said is that another action is pending or that the subject has been finally adjudicated. In this case, neither of these objections has been taken or relied upon, the whole contention being that the remedy given by section 1644 of the compiled laws is another remedy, and that because of that section this court could not have issued a writ of mandamus if the first application had been made here. I think, on the contrary, that if the proceeding under section 1644 is an original proceeding in which an appeal lies to this court, it is, after all, nothing but a summary mode of obtaining a mandamus, and that it does not deprive this court of its concurrent jurisdiction in such cases. To hold otherwise would be to admit the power of the legislature to deprive us of our constitutional jurisdiction by the simple device

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of calling a writ of mandamus by some other name, or by making the practice in such cases, or a particular class of such cases, more summary or speedy in the district courts than in this court.

Undoubtedly an application to this court for a writ of mandamus in any sort of case would be defeated by showing another action pending or finally adjudicated in the district court, for the same cause; but in my opinion the respondent, in order to avail himself of either of those objections, should be required to make it specifically either by his demurrer or answer. In this case he has not done so. His objection is that the petitioner has another remedy, whereas all that appears is that he can obtain the same remedy, a writ of mandamus, by prosecuting another action, already commenced, in a court of concurrent jurisdiction. For these reasons I dissent from the conclusions of the court.

RESPONSE TO PETITION FOR REHEARING.

By the Court, LEONARD, J.:

The rehearing in this case has strengthened us in the opinion that the decision before filed herein is correct. (Civ. Prac. Act, sec. 507; *Adams v. Woods*, 18 Cal. 31.)

The petitioner should pay the costs, and it is so ordered.

BEATTY, J. C., dissenting: I dissent.

[No. 946.]

JEROME IVANCOVICH ET AL., APPELLANTS, v. LEOPOLD STERN ET AL., RESPONDENTS.

CLAIM AND DELIVERY OF PERSONAL PROPERTY—PLEADINGS—FRAUD.—

S., as constable, levied an attachment upon certain goods as the property of Y. Plaintiffs thereafter brought suit against S. to recover the property. Y. was allowed to intervene. He alleged that plaintiffs, with the intent to defraud him and his creditors, had, upon certain false representations, induced him to execute a bill of sale to them: *Held*, upon a review of the facts, that under the pleadings it was proper to admit evidence as to the alleged fraudulent acts and intention of plaintiffs.

Opinion of the Court—Hawley, J.

SALE—WHEN FRAUDULENT.—Where a party executes and delivers a bill of sale to another with intent to hinder, delay, or defraud his creditors in the enforcement of their claims, or to secure any benefit to himself at the expense of his creditors, the transaction is fraudulent.

IDEM—WHEN NOT FRAUDULENT.—A debtor has a right to protect his property from being sacrificed, provided he does not do so at the expense of his creditors. Where a sale is made to a party who agrees to immediately pay all the vendor's creditors in full, the transaction is not fraudulent.

IDEM—FRAUDULENT REPRESENTATIONS.—Where Y. was induced to part with his property to I. and C., under the false promise that they would pay all his debts, and prevent his property from being sacrificed, such statements having been made by them for the purpose of misleading and deceiving him, so as to enable them to secure the possession of the property: *Held*, that such a sale would be fraudulent, and that Y. would be entitled to relief upon that ground.

ACTUAL POSSESSION—EMPLOYMENT OF CLERK OF VENDOR.—The mere fact of the re-employment of the clerk of the vendor by the vendees does not render a sale of personal property invalid.

RULE AS TO CONFLICT OF EVIDENCE ENFORCED.

FRAUDULENT SALE.—An instruction which declares that if the sale was actually made with the intention to hinder, delay, and defraud the creditors of the vendor, and the vendee had knowledge of such intention, then the sale was fraudulent: *Held*, correct.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts are sufficiently stated in the opinion.

Ellis & King, for Appellants.

I. There is no allegation on part of defendant of any fraud, actual or constructive. Defendants can not recover upon that ground. (*Kent v. Snyder*, 30 Cal. 666.)

II. The intervenor alleges his own fraud only, or at least a collusive fraud, and is not entitled to recover. (*Allison v. Hagan*, 12 Nev. 38.)

III. The representations of Ivancovich could only be mere expressions of opinion, and did not amount to fraud in law. (*Banta v. Savage*, 12 Nev. 151.)

Wells & Stewart, for Respondents.

By the Court, HAWLEY, J.:

The plaintiffs, claiming to be the owners of, and entitled

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to the possession of, the entire stock of merchandise, consisting of fruits, vegetables, etc., "in the store lately occupied by one C. Yantovich," proceeded, in the manner provided by statute for the claim and delivery of personal property, to take possession of the same.

The defendant, Leopold Stern, as constable of Carson township, justifies his possession of the property by virtue of a writ of attachment issued in the suit of *Jacob Tobriner v. C. Yantovich & Co.*, and in his answer alleges, among other things, that the plaintiffs hold and possess the property "wrongfully and unlawfully as against the rightful and lawful claims and possession of this defendant."

C. Yantovich was, on motion, allowed to intervene and unite with the defendant Stern in making a defense to the action. In his plea of intervention he alleges that, on the thirty-first day of July, 1877, he was the owner of the personal property mentioned in the complaint; that it was of the value of one thousand four hundred dollars; that he was then indebted to plaintiffs in the sum of about one hundred and thirty dollars, and to one Jacob Tobriner in the sum of one hundred and thirty-nine dollars, and to other parties in various sums, making in all an aggregate of indebtedness of about nine hundred dollars; that on said day the said "plaintiffs, intending to defraud this intervenor, and planning and contriving how they might defraud him, did falsely and fraudulently represent and say to him in substance and effect that his creditors were about to sue him and attach all his said personal property, and that if they did so it would break up his business, take all his property, and not pay all his debts;" that plaintiffs further advised him to sell said property to them to prevent such suits, and proposed in that connection to buy his property, on condition and with the understanding that they, on receipt of the property, would assume and pay all his debts, including that of Jacob Tobriner, and then return the remainder in value, if any, of said property to him; that he believed the statements and representations of the plaintiffs; that he was anxious to pay his debts and to prevent his property from being sold at a sacrifice; that he gave, as he supposed, a bill of

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sale of his property to the plaintiffs, "but never read the same or heard it read;" that plaintiffs, without making any inventory thereof, forced him to give them immediate possession of the building where the property was; that they have not paid any of his indebtedness, and that their acts were intended "to wrong, cheat, delay, and defraud him" and his creditors, and "did wrong, cheat, delay, and defraud his said creditors."

The plaintiffs deny these averments, and claim that the intervenor was at the time of the sale indebted to them in the sum of four hundred and ninety-five dollars; that the sale was made "for a good and valuable consideration," and was absolute in its terms.

The testimony—as is usual in cases of this kind—was conflicting upon all the material points.

Special issues were submitted to the jury and the following facts were found: That the sale was fraudulent "as to the creditors of said Yantovich;" that it was fraudulent "as to the said Yantovich;" that the value of the property was one thousand three hundred dollars; that there was not a complete actual delivery of the property by Yantovich to Ivancovich, nor a full or complete possession thereof by them up to the time of the levying of the attachment in the case of *Tbbriner v. Yantovich*, "except as that possession may be modified in law by the retention by the Ivancovichs of the former clerk of Yantovich;" that Yantovich in making said sale did not intend to hinder, delay, or defraud his creditors; that Nobly, the former clerk of Yantovich, was in the employ of the Ivancovichs, by re-employment at an agreed salary, at and before the levying of the attachment, and that Yantovich, at the time of the sale, was indebted to the Ivancovichs in the sum of four hundred and ninety-six dollars and forty cents.

The court thereupon rendered judgment in favor of the intervenor for the return of the property; that if return could not be made, "plaintiff do pay to defendant the sum of one thousand dollars," * * * the value as stated in plaintiffs' complaint, "less the sum of four hundred and ninety-six dollars and forty cents," amount due them from

Yantovich. Provision is also made for the payment of the Tobriner judgment.

Upon this statement of facts the several questions raised by appellant may be briefly disposed of:

1. Under the pleadings it was proper for the court to admit the evidence as to the alleged fraudulent acts and intentions of the plaintiffs.

2. The plea of intervention did not allege any fraud on the part of the intervenor. If his averments and his testimony in support thereof were true, there was no fraud on his part. The position of appellants, that if any fraud existed it was a collusive fraud, and within the rule announced by this court in *Allison v. Hagan*, 12 Nev. 38, and *McCausland v. Ralston, Adm'r*, Id. 195, is not upheld by the pleadings or the proofs.

If the purpose of the intervenor in making the bill of sale of his property was to hinder and delay his creditors in the enforcement of their claims, or to secure any benefit to himself at the expense of his creditors, the transaction would be fraudulent under the statute.

The testimony, however, warrants the conclusion that his intention was that the plaintiffs should, on receipt of the goods, immediately pay all his creditors in full, and that the sale was made on that understanding. If so, the transaction was entirely innocent.

A debtor has an undoubted right, under the law, to protect his property from being sacrificed, provided he does not do so at the expense of his creditors. If he sells his property in order to raise money to pay his debts his creditors are not defrauded, and this is what the intervenor claims to have done. There is nothing to prove that he intended to put off the payment of his debts for a single day. It is true that the sale of his goods was attended by some suspicious circumstances; but he explains those circumstances in his testimony, and the verdict of the jury is in his favor.

3. The testimony of Chinda, the former partner of Yantovich, as to the value of the stock of merchandise on the twenty-ninth of July, 1877, with the testimony as to the

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average daily sales about that time, tended to corroborate the testimony of Yantovich and others as to its value on the first day of August, 1877, and was, therefore, properly admitted. The plaintiffs could not, in any event, consistently claim that they had been prejudiced by this testimony, because the value of the property, as set forth in the judgment, is the same as is alleged in the plaintiffs' complaint.

4. The court did not err to the prejudice of appellants by allowing the testimony that plaintiffs had not paid the debt due from Yantovich to Tobriner, as, upon the intervenor's statements of the transactions between the parties at the time of the alleged sale, they had agreed to do. It tended to show a failure on their part to comply with the conditions of the sale.

5. The jury, from the issues found, must have decided that the statements made by plaintiffs to Yantovich at the time of the alleged sale were not "mere expressions of opinion," as claimed by appellants.

If plaintiffs actually made the statements alleged and testified to, and if Yantovich, believing the statements to be true, was induced to part with his property under the false promise that plaintiffs would pay all his debts and prevent his property from being sacrificed, and such statements were made by the plaintiffs for the purpose of misleading and deceiving him, so as to enable them to secure the possession of the property and thereby obtain an undue and unfair advantage, the sale was fraudulent and the intervenor was entitled to relief upon that ground.

6. The finding of the jury, that there was no delivery and continued change of possession of the goods, is not unsupported by the pleadings or proofs.

Under certain circumstances and conditions the retention of a former clerk in the same capacity in which he had previously acted is not a badge of fraud. The essential fact to be proved, under the circumstances of this case, was whether or not there was an actual and continued change of possession. If this was sufficiently shown, then the mere fact of the re-employment of the clerk of the vendor

Points decided.

by the vendees would not render the sale invalid. (*Gray v. Sullivan*, 10 Nev. 417.)

The question as to what facts are necessary to be proved in order to constitute an actual and continued change of possession is always more or less dependent upon the particular facts and circumstances of each case; but in every case the change of ownership must, under the law, "be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be such as to give evidence to the world of the new owner."

There was a direct conflict of evidence upon the question of possession, and the jury upon this point, as well as upon all others where there was a conflict of testimony, found the facts in favor of the intervenor and defendant. The record, in our opinion, as before stated, contains sufficient evidence to support their conclusions.

7. Instruction number one declares that if the sale was actually made with the intention to hinder, delay, and defraud the creditors of the vendor, and the vendee had knowledge of such intention, then the sale was fraudulent.

This instruction is not erroneous. (*Greenwell v. Nash*, 13 Nev. 286.)

It must be considered in connection with the other instructions, wherein the court distinctly stated the claims of the respective parties to the property in controversy, and properly announced the principles of law applicable thereto.

The judgment of the district court is affirmed.

14 347
16 90

[No. 983.]

THE STATE OF NEVADA, RESPONDENT, v. M. M. McCORMICK ET AL., APPELLANTS.

JURISDICTION OF SUPREME COURT—CRIMINAL CASES—APPEAL.—In construing Art. VI., sec. 4, of the constitution: *Held*, that the right of appeal in criminal cases is restricted to cases where the punishment adjudged is a sentence to confinement in the state prison, or to death.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

Opinion of the Court—Hawley, J.

The facts appear in the opinion.

A. L. Fitzgerald and Thomas S. Ford, for Appellants.

The supreme court has jurisdiction of this appeal. (*State v. Borowsky*, 11 Nev. 119.) Defendants were indicted for a felony, and convicted of a felony.

M. A. Murphy, Attorney-General, for Respondent.

The defendants were sentenced to be confined in the county jail, and to pay fines. The judgment of the court is to determine the character of the case for the purpose of the appeal. (*People v. Cornell*, 16 Cal. 187; *People v. Apgar*, 35 Id. 389; *People v. Applegate*, 5 Id. 295; *People v. Shear*, 7 Id. 139; *People v. Vick*, 7 Id. 165.)

By the Court, HAWLEY, J.:

The defendants were jointly indicted, tried and convicted of unlawfully and feloniously resorting to a certain house in Eureka, "for the purpose of indulging in the use of opium, by smoking the same," contrary to the provisions of the opium act. (Stat. 1879, 121.) They were sentenced to a term of imprisonment in the county jail, and to pay a fine.

The attorney-general moves to dismiss the appeal on the ground that this court has no jurisdiction.

The constitution provides that the "supreme court shall have appellate jurisdiction * * * in all criminal cases in which the offense charged amounts to a felony." (Art. VI. sec. 4.)

"A felony is a public offense punishable with death or by imprisonment" in the state prison. (Criminal Practice Act, sec. 3; 1 C. L. 1677.)

"Every other public offense is a misdemeanor." (Sec. 4; 1 C. L. 1678.)

The charge in the indictment is of a felony; but under the provisions of the statute the offense may be punished either as a felony or a misdemeanor.

The attorney-general contends that the punishment inflicted by the court determines the grade of the offense.

Opinion of the Court—Hawley, J.

The People v. Cornell, 16 Cal. 187; and *The People v. Apgar*, 35 Cal. 389, are cited in support of this position. The principles decided and the conclusions reached in these cases authorize the dismissal of the appeal herein, unless, as claimed by appellant's counsel, there is a distinction to be drawn by the change of the phraseology in the constitution of the respective states that will warrant a different construction.

The constitution of California gives an appeal "in all criminal cases amounting to felony." The Nevada constitution "in all criminal cases in which the offense charged amounts to a felony."

We do not think there is any difference in the meaning of the language used.

If a defendant is indicted for grand larceny, the "offense charged amounts to a felony," but he may, under the indictment, be only convicted of petty larceny, which is a misdemeanor. Could it, in such a case, consistently be argued that because the "offense charged" in the indictment was a felony, this court had jurisdiction on appeal? We think not.

A defendant may be indicted for an assault with intent to kill, and upon trial be convicted only of an assault and battery, or simple assault. In all such cases it is clear to our minds that the judgment appealed from determines the "offense charged."

The same rule would prevail where the defendant is indicted for an assault with a deadly weapon, with an intent to inflict upon the person of another a bodily injury. If the defendant is found guilty of the offense charged in the indictment, he may, as in the case under consideration, be punished for a felony or for a misdemeanor, at the discretion of the court.

If punished as a felony, that is the "offense charged," from which an appeal may be taken. If punished as a misdemeanor, that is the "offense charged," and an appeal will not lie.

We are of the opinion that the right of appeal, under the

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constitution, is restricted to cases where the punishment adjudged is a sentence to confinement in the state prison, or to death.

In this case the judgment appealed from is a misdemeanor.

The appeal is dismissed.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF NEVADA.
OCTOBER TERM, 1879.

14 351
14 387
18 279
16 296
20 307
21* 680

[No. 964.]

A. J. BUNTING, APPELLANT, v. THE CENTRAL PACIFIC RAILROAD CO., RESPONDENT, AND MICHAEL HARRISON, APPELLANT, v. THE CENTRAL PACIFIC RAILROAD CO., RESPONDENT.

ACTION AGAINST RAILROAD COMPANY—CONTRIBUTORY NEGLIGENCE—DAMAGES.—Where it affirmatively appears that plaintiff was careless, and that his negligence proximately contributed in producing the injury complained of, he is not entitled to recover any damages.

IDEM—NEGLIGENCE—QUESTION OF LAW.—If a party, knowingly about to cross a railroad track at a regular crossing on a public street of a town, can have an unobstructed view of the railroad, so as to know of the approach of a train a sufficient time to clearly avoid any injury from it, and he fails to use his ordinary faculties, and an injury occurs, he can not, as a matter of law, recover.

IDEM—NEGLIGENCE—QUESTION OF FACT.—If the view of the railroad is so obstructed by the act of the railroad company as to render it difficult to learn of the approach of a train, or there are other circumstances calculated to deceive a party approaching the track, such party has the right to presume that the usual and proper signals will be given by the railroad company; and if not given, then the question whether it was negligence on his part, is a question of fact for the jury to determine.

IDEM—SUDDEN DANGER.—Where a party suddenly finds himself in great peril, the law does not demand the exercise of the soundest discretion, without regard to the surrounding circumstances.

Argument for Appellants.

WHEN QUESTION OF NEGLIGENCE SHOULD BE SUBMITTED TO A JURY.—

Whenever the question whether plaintiff was guilty of contributory negligence, whether he exercised ordinary and reasonable care, is dependent upon a state of facts, in regard to which reasonable men might honestly differ, the question should be submitted to the jury.

IDEM—NONSUIT.—Upon a review of the testimony: *Held*, that the court erred in granting a nonsuit.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts are stated in the opinion.

Thomas E. Haydon, for Appellants.

I. *Solen v. V. and T. R. R. Co.*, 13 Nev. 106, is conclusive in favor of appellants.

II. Where a railway is carried across a public highway so that those approaching on the highway can neither distinctly see nor hear approaching trains, the company is required to use a greater degree of care than in other places. (*Richardson v. N. Y. Cent. R. R. Co.*, 45 N. Y. 846; 35 Id. 75.)

III. If no signal be given at the crossing of a street, a person crossing has the right to presume the track clear. *Philadelphia and Trenton R. R. Co. v. Hagan*, 47 Pa. St. 244; *Pittsburg, Fort Wayne and Chicago R. R. Co. v. Dunn*, 56 Pa. St. 280; 36 N. Y. 132; 38 Id. 445.)

The bell should be rung so long as there is danger of encountering passers-by. (*Whiton v. Chicago and N. West. R. R. Co.* 2 Bissell, U. S. C. C. 282.)

IV. If the view of the track is obstructed it is a question of fact for the jury to determine whether the injured party was guilty of any negligence in going upon it. (*Artz v. Chicago, Rock Island and Pacific R. R. Co.* 34 Iowa, 153.)

V. A traveler is not bound to stop his team or leave it to go on to the track to see if a train is coming; he has the right to presume, at a street crossing, that signals will be given by bell or whistle, sufficient to overcome the noise of vehicles ordinarily passing over such crossings. (*Davis v. N. Y. Cent. and Hud. R. R.* 47 N. Y. 400; *Duffy v. Chicago and N. W. R. R.* 32 Wis. 269; *Egan v. Fitchburg*

Argument for Respondent.

R. R. Co. 101 Mass. 315; 34 N. Y. 622; 31 How. Pr. 181; *Kennayde v. Pac. R. R. Co.* 45 Mo. 255; *Taber v. Missouri Val. R. R. Co.* 46 Id. 353.)

VI. A railroad company can not impute negligence to a person if his want of vigilance is occasioned by an omission of duty on the part of defendant. (*Penn. R. R. Co. v. Ogier*, 35 Pa. St. 60, 1860.)

The company must run its trains with reference to the safety of persons rightfully on its track. (*Kan. Pac. R. R. Co. v. Pointer*, 9 Kan. 620.)

It is neglect in a railway company to permit its cars to stand upon or obstruct the view of public streets. (*McGuire v. Hudson River R. R. Co.*, 2 Daly, N. Y. 76.)

VII. It is only where a question of fact is entirely free from doubt that the court has the right to apply the law without the action of the jury. (*Bernhardt v. Rens. and Saratoga R. R. Co.* 32 Barb. N. Y. 165; 18 How. Pr. N. Y. 427; 19 Id. 199; 23 Id. 166; *Central R. R. Co. v. Moore*, 4 Zabris. N. J. 824.)

Due care of a person may be inferred from his ordinary habits. (*Johnson v. Hudson River R. R. Co.*, 20 N. Y. 65.)

The speed of a railroad in a town or city must be regulated with due regard to the safety of the inhabitants. (*Meyer v. Midland Pacific R. R. Co.* 2 Nebraska, 319.)

VIII. The act of the railroad company after an accident, in removing obstructions and lowering rate of speed, etc., is an admission of negligence on their part at time of the accident. (*West Chester and Phil. R. R. Co. v. McElwee*, 67 Pa. St. 311; 2 Wharton on Evidence, 1081.)

IX. Where a person is startled or alarmed, the law does not require his efforts to escape to be regulated by the soundest discretion. (*Robinson v. W. P. R. R. Co.* 48 Cal. 421.)

Harvey S. Brown and W. H. L. Barnes, for Respondent.

I. In an action to recover damages for an injury to plaintiff caused by an accident at a street crossing, the burden of proof is on the plaintiff, not only to show negligence and misconduct on the part of the defendant, but ordinary care

Argument for Respondent.

and diligence on his own part. (*Lane v. Crombie*, 12 Pick. 176; *Gay v. Winter*, 34 Cal. 164; *Gribble v. Sioux City*, 38 Iowa, 390; *Lewis v. Baltimore & O. R. R.*, 38 Md. 588; *Johnson v. Tillson*, 36 Iowa, 90; *Muldcwney v. Ill. R. R. Co.*, Id. 465; *Bangor & Piscataquis R. R. Co. v. Jones*, 15 Pac. L. Rep. 29; *North Penn. R. R. Co. v. Heileman*, 49 Pa. St. 60; *Hanover R. R. Co. v. Coyle*, 55 Id. 396; *Central R. R. Co. of N. J. v. Feller*, 84 Id. 228; *Gerety v. Phil. Wil. & Balt. R. R. Co.*, 81 Id. 274; *Gerety v. Phil. Wil. & Balt. R. R. Co.*, 16 Am. Ry. 164; *Grows v. Maine C. R. Co.*, 16 Id. 326; *Allyn v. Boston & A. R. R. Co.*, 105 Mass. 77; *Todd v. Old Colony & F. R. R. Co.*, 7 Allen, 207; *Nicholls v. Great West. R. R. Co.*, 27 Upper Can. Q. B. 382; *Morrison v. Erie R. Co.*, 56 N. Y. 302.)

II. The omission to put up signboards or ring bells at public crossings even when required by statute does not render the company absolutely liable for injuries to persons or property. Evidence of such omissions merely establishes the negligence of the company, and if it appears that the plaintiff's negligence contributed to the injury, he can not recover and should be nonsuited, or the court should instruct the jury to find for defendant. (*Dodge v. Burlington C. R. & M. R. R.*, 34 Iowa, 277; *Havens v. Erie R. Co.*, 41 N. Y. 296; *Baxter v. Troy and Boston R. R.*, Id. 502; *McGrath v. N. Y. Centr. & H. R. R.*, 59 Id. 470; *Cin. C. C. & I. R. R. v. Elliott*, 28 Ohio, 340; *Harlan v. St. L., Kansas C. & N. R. R.*, 64 Mo. 480; *Fletcher v. Atlantic & Pac. R. R.*, Id. 484; *Chicago, R. I. & Pac. R. R. v. Houston*, 10 Chicago L. N. 139; *Stackus v. N. Y. C. & H. R. R. Co.*, 7 Hun. 560; *Gorton v. Erie R. Co.*, 45 N. Y. 660; *Butterfield v. Western R. R. Co.*, 10 Allen, 532.)

III. Where a person who is about to cross a railroad track at a public crossing could either see or hear an approaching train, but fails to look or listen, he is guilty of negligence, and is not entitled to recover for injuries caused by a collision happening immediately thereafter. (*Haines v. Ill. Cen. R. R.*, 41 Iowa, 227; *St. L. & T. H. R. R. v. Manly*, 58 Ill. 300; *Solen v. V. & T. R. R. Co.*, 13 Nevada, 106; *Brown v. Mill. & St. Paul R. R.*, 22 Minn. 165; *Pa. R.*

R. v. Beale, 73 Pa. St. 504; *Flemming v. W. P. R. R.*, 49 Cal. 253.)

IV. The court did not err in refusing to allow the witnesses to give their opinions as to the speed of defendant's train.

Where opinions of witnesses are admissible and competent at all, they must be in some way peculiarly qualified to speak on the subject, and have knowledge not possessed by the mass of persons of ordinary experience and intelligence. (*Harris v. Panama R. R. Co.*, 3 Bos. 7; *Reynolds v. Jordan*, 6 Cal. 108; *Enright v. S. F. & S. J. R. R. Co.*, 33 Cal. 236; *Hastings v. The Uncle Sam*, 10 Cal. 341; *Harpending v. Shoemaker*, 37 Barb. 270; *Page v. Parker*, 40 N. H. 59.)

I. B. Marshall, also for Respondent.

By the Court, HAWLEY, J.:

The above entitled causes were, by consent of the respective counsel, tried together. The district court granted a nonsuit.

The statement on appeal shows that, on the morning of the twelfth of June, 1877, at a regular crossing on a public street in the town of Reno, a collision occurred between the locomotive of the defendant, attached to its regular passenger train of cars, and a two-horse team and wagon then being driven, or attempted to be driven, over the railroad tracks. The horses were killed. Each of the plaintiffs was injured and their property damaged.

There was sufficient testimony tending to prove that defendant was negligent in not ringing its bell or blowing its whistle, and was traveling at an unusually fast rate of speed, to have authorized the court to submit the question of defendant's negligence to the jury.

If the defendant was negligent in these respects its negligence would not, under the principles decided by this court in *Solen v. Virginu and Truckee Railroad Company*, 13 Nev. 106, relieve the plaintiffs from their duty of exercising ordinary care and prudence. If it, therefore, affirmatively ap-

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pears, as claimed by respondents' counsel, that the plaintiffs were careless, and that their negligence proximately contributed in producing the collision, they are not entitled to recover any damages; but must bear the consequences of their own folly.

Were the plaintiffs negligent? Did they use ordinary care and prudence? Was the collision caused by the improper conduct and negligence of the defendant; or, did the plaintiffs so far contribute to the injuries received by their own negligence, that but for such negligence and want of due care on their part the accident would not have happened? Was the court right in deciding, as a matter of law, that plaintiffs did not exercise ordinary care and prudence; or, were the plaintiffs entitled to have that question submitted to the jury as a question of fact?

The authorities which bear upon these questions are not entirely uniform; yet an examination of them clearly shows that courts have usually closely scrutinized the peculiar facts, surroundings and conditions, of each particular case, and the apparent conflict of the decisions can, in many cases, be readily reconciled by the difference in the state of facts which each case presented.

The testimony in this case tends to show that there were passenger and box cars standing on the north side track that obstructed the view of the main track, and prevented the plaintiffs from seeing the approaching train until they came nearly on a line with the side track. The distance from the wagon-shop—alluded to in the testimony—to the north side track is about seventy-five feet. The distance from the south rail of the north side track to the north rail of the main track is twenty-one feet. There is some testimony tending to show that there were places between the wagon-shop and the north side track where the plaintiffs, if they had been looking in that direction, might have seen the approaching train. The evidence tends to show that they could have seen the approaching train before they crossed over the north side track if they had been looking in that direction. Some of the witnesses testified that if plaintiffs had stopped for one quarter of a minute the collision would

not have occurred. The team was constantly moving from the time it left the stable until it arrived at the north side track. The wagon did not make much noise until it got on the track. Harrison says: "The wagon made a noise, but not enough to dim my hearing from anything else."

The testimony tended to show that defendant, in running its passenger train down the grade before arriving at the crossing, where the collision occurred, did not use any steam; that the train was worked by air brakes, and that the noise of the approaching train was not near as great as if steam had been applied.

The plaintiff Bunting testified that he was familiar with the crossing and with the trains of the defendants' cars that were running on the road, and knew the time of their usual arrival and departure; that whenever he crossed the track, which was quite frequently, he was always on his guard; that on the morning of the accident he left the stable a little after seven o'clock, and drove directly to the track at a slow trot; that he "looked up the track and down and saw nothing;" that as he came near the north side track, opposite the box or passenger cars, he heard a rumbling sound. To quote his exact language: "It sounded as if the locomotive was moving, and then I saw the locomotive was coming, and Harrison looked up and said, 'My God, we are killed!' and he grabbed the lines, and I struck the off horse with the whip. As I moved around, and came quartering down the track, I hit the off horse; then the train struck me. I heard no sound whatever. It was just like the rumbling of a train switching down cars. The noise I thought I heard was the train coming west, and I have often taken notice that it sounds as if it was down the track, passing the streets on that side. When a train is coming from the west, and passing along the open streets west of this main crossing, the sound will be echoed there. I was almost sure that the rumbling sound that I heard was the lower locomotive that was moving. I looked that way to see before I got on the track. I saw the train was standing and I kept on going on a fast walk."

Harrison's testimony is substantially the same. He said:

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“I did not hear the train coming. I looked up to see if there was a train coming. I looked when I got to the corner of the blacksmith shop. I did not see any train from there. I looked from the west and also down. Just as we started to go on the track I first heard the sound of the train. There was a string of cars as we started to go up on the track. As we crossed I did not see any train. When they were within twenty or thirty feet, right on top of us, I first heard the train. We could not move either way. When I saw her coming through the string of cars that backed up the track I grabbed the lines and hollered out, ‘We are killed!’ That is the first sound I heard. When I first saw the train the fore wheels were not quite on the first track. I was looking up in that direction. Most of the time I felt as if we could get across in the wagon. I saw nothing to interfere up to that time. To my knowledge there was no signal or sound of warning given by the train.”

In our opinion the real question, upon which the decision in this case must necessarily turn, is whether or not in law the plaintiffs’ were bound, in the exercise of proper care, to have stopped their team and listened for the approach of the coming train.

The testimony of several witnesses is very positive and direct that if the plaintiffs had stopped at any point between the corner of the wagon shop and the north-side track and listened, they could have heard the rumble of the approaching train.

An examination of the authorities which we had occasion to review in *Solen v. Virginia and Truckee Railroad Company*, and of other cases to which our attention has since been called, leads us to the conclusions that where a traveler, knowingly about to cross a railroad track at a regular crossing on a public street of any town or city, can have an unobstructed view of the railroad so as to know of the approach of a train, a sufficient time to clearly avoid any injury from it, and he fails to use his ordinary faculties and an injury occurs, he can not, as a matter of law, recover, although the railroad company may also have been negligent; but, on the other hand, if the view of the railroad, as the cross-

ing is approached, is so obstructed by the act of the railroad company as to render it difficult or impossible to learn of the approach of a train, or there are peculiar or complicating circumstances calculated to deceive or throw the traveler off his guard, he has the right to presume that the usual and proper signals of the approaching train will be given by the railroad company, and if they are not given, then whether it was negligence on his part, under the particular circumstances of the case, is always a question of fact for the jury to determine. Although the traveler, whenever so situated as to enable him to do so, must make vigilant use of his eyes and ears in approaching a railroad track to ascertain if there is a train coming, he is not always bound to stop for the purpose of listening.

In *Pennsylvania Railroad Company v. Beale*, the railroad, from "natural and other obstructions, could not be seen nor the whistle heard," and the court held that the failure of the traveler to stop before crossing was "negligence *per se* and a question for the court." (73 Pa. St. 504.)

In *Flemming v. The Western Pacific Railroad Company*, the plaintiff was driving along the county road, which was extremely dusty. In front of him were other wagons, "which, together with his own, raised a cloud of dust which was so dense that he could not see the railroad track," and the court very properly held that "if his vision was so obscured by dust that he could not see a train within fifty feet of him, the most ordinary prudence would have suggested the necessity of stopping his team, that he might listen, under the most favorable circumstances, to ascertain whether a train was approaching."

In *Mackay v. New York Central Railroad*, where the difficulty of crossing the track had been caused by the defendant itself in erecting a building and piling up wood so as to entirely obstruct the view, the court quotes with approval the remarks of the justice who gave the opinion at general term that no case had gone to the length of holding "that a person approaching a railroad crossing was bound to stop his team and wait until he could ascertain whether a train was coming, or to leave his team and go and look up and

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down the track, or the law would hold him "negligent. (35 N. Y. 78.) To the same effect are the subsequent decisions of the court in *Davis v. N. Y. C. & H. R. R. Co.*, 47 N. Y. 402, and *Dolan v. D. & H. C. Co.*, 71 N. Y. 288.)

In *Duffy v. The Chicago and Northwestern Railway Company*, the railroad track approached the highway through a deep cut in such a manner as to prevent a person approaching along the highway from the south from seeing a train coming from the north until he came very near the track. Cole, J., in delivering the opinion of the court, upon the question of contributory negligence, said: "It does not appear that the plaintiff was guilty of any carelessness or want of care in approaching the crossing. He says that he listened some for the train, but did not hear anything. He supposed the train from the north had passed down, and he was looking out for the train from the south more than from the north. The track at the north was so obstructed by the high bank on the right that it was impossible for the plaintiff to see the train approaching from that direction, until he was within fifteen feet of the track. All the precaution he could take to ascertain whether a train was approaching was to listen as he advanced towards the crossing, unless he stopped his team, got out of his wagon and went upon the track and looked north for the train. But this would be exercising extraordinary care and diligence, greater than the law imposed upon him." (32 Wis. 274.)

Some stress was made in the oral argument upon the fact that the plaintiffs did not in direct terms testify that they listened at all. It is, perhaps, enough to say of this objection, that the testimony fails to show beyond controversy that if they were listening they could have heard the rumbling sound of the train any sooner than they did while their wagon was in motion, and unless they were in law bound to stop their team, their negligence in this respect, if established, would not necessarily determine that they were not in the exercise of due care. But we think their testimony, when fairly considered, clearly shows that they were listening, although they did not, in direct words, so

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state. (*Ernest v. Hudson River Railroad Company*, 39 N. Y. 64.)

It was also claimed that the plaintiffs were negligent in not stopping their team at the north side track when they saw the train coming. Upon this point the authorities justify the statement that courts are not inclined, as a matter of law, to hold parties negligent in such a case of emergency for not acting coolly and wisely. (Wharton on Negligence, sec. 304.)

The plaintiffs, after arriving at the north side track, had no time for cool deliberation as to the best course to pursue. The schedule time for the passenger train to arrive at Reno was seven o'clock. It did not arrive that morning until half-past seven. The plaintiffs were under the impression that the train had passed by, until they heard the rumbling sound as they came upon the track. Like the plaintiff in *Duffy v. The Chicago and N. W. R. R. Co.*, *supra*, they first thought the sound came from a train approaching from the opposite direction, and looked that way, and, as Bunting testifies, when they saw the train coming "there was no chance to escape." Certain it is, that the situation in which plaintiffs suddenly found themselves placed was one of great peril. They had but little, if any, time to make even a hasty survey of the field of danger and decide correctly as to their chances. They were liable to be alarmed and excited and to err in their judgment. The law in such cases does not demand the exercise of the soundest discretion without regard to the surrounding circumstances. (*Robinson v. W.P. R. R. Co.*, 48 Cal. 421; *McGovern v. N. Y. C. & H. R. R. Co.*, 67 N. Y. 421; *Moore v. Central Railroad*, 47 Iowa, 690; *Larabee v. Sewall*, 66 Me. 381.)

The question, therefore, whether plaintiffs then, as well as at any other time, acted with as much care and prudence as an ordinarily prudent and reasonable person, in a fair and reasonable endeavor to perform his duty and avoid danger, would exercise under similar circumstances, was, in our opinion, a question of fact that ought to have been submitted to the jury.

Upon a careful examination of all the testimony in this

Points decided.

case, we think the question whether plaintiffs were guilty of contributory negligence, whether they exercised ordinary and reasonable care, is not free from doubt. In our opinion the proper solution of this question upon the record presented to us is dependent "upon a state of facts in regard to which reasonable men might honestly differ;" and that, upon the principles established by this court in *Solen v. V. & T. R. R. Co.*, and sustained by the great weight of authority, the plaintiffs were entitled to have the question submitted to the jury as a question of fact.

In addition to the authorities cited in *Solen v. V. & T. R. R. Co.*, see *Hays v. Miller*, 70 N. Y. 116; *Dolan v. Delaware and Hudson Canal Co.*, 71 N. Y. 288; *Cook v. Union Railway Company*, 125 Mass. 57; *Bonnell v. The Delaware, L. and W. R. R. Co.*, 39 N. J. L. 189; *Fernandez v. The Sacramento City Railway Company*, 52 Cal. 45.

The judgment of the district court is reversed and the cause remanded for a new trial.

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16 191

[No. 961.]

ANNA B. STONE, RESPONDENT, v. GEORGE T. MARYE
ET AL., APPELLANTS.

CERTIFICATES OF STOCK—TRANSFER OF—TRUE OWNER, WHEN ESTOPPED FROM ASSERTING TITLE.—Certain certificates of mining stock, issued in the usual form, in the name of, and indorsed by, C. & Co., as trustees, were delivered by plaintiff to M. as collateral security for an indebtedness then due to M. M. delivered the certificates to G. who had full knowledge of the former transaction. Plaintiff, thereafter, tendered to M. & G. the full amount of the indebtedness. G., thereafter, claiming to be the owner, employed defendants as stock brokers to sell said certificates in the stock board of San Francisco. Defendants sold the same and the proceeds were placed to G.'s credit. Defendants had no knowledge of the previous transaction and were not aware that plaintiff claimed any interest in the certificates: *Held*, that plaintiff was estopped from asserting her title to the certificates as against the defendants.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts are stated in the opinion.

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Lewis & Deal and E. B. Stonehill, for appellants.

The plaintiff having clothed her creditors with all the *indicia* of ownership and enabled them to transfer the stock to innocent parties without notice of her interest, should suffer any loss occasioned by her own act. (*Brewster v. Sime*, 42 Cal. 139; *Thompson v. Toland*, 48 Id. 99; *Crocker v. Crocker*, 31 N. Y. 507; *McNeil v. Tenth Nat. Bank*, 46 Id. 325; *Winter v. Belmont M. Co.*, 53 Cal. 428.)

C. H. Belknap, for Respondent.

By the Court, HAWLEY, J. :

From the facts in this case, as found in the court below, it appears that in the month of September, 1877, the plaintiff deposited with Martha McSweegan two certificates representing fifteen shares of the capital stock of the Ophir Silver Mining Company, as collateral security for the payment of one hundred and eighty-five dollars, then due and owing from said plaintiff to said McSweegan; that thereafter plaintiff tendered to Martha Sweegan the full amount of said indebtedness, and demanded the return of said certificates of stock, which was refused; that thereafter said Martha McSweegan assigned said indebtedness to William Gordon, for a valuable consideration, and delivered to said Gordon said certificates of stock as security for said loan; that Gordon received the certificates with full knowledge of the circumstances under which they were held by the said Martha McSweegan; that thereafter plaintiff tendered to said Gordon the full amount of said indebtedness, and demanded a return of said certificates, which was refused; that thereafter, on the sixth day of October, 1877, the said certificates of stock were delivered to the defendants by said Gordon, and on the thirtieth day of October, 1877, said Gordon employed defendants, at Virginia City, Nevada, as stock-brokers, to sell said certificates in the said San Francisco Stock and Exchange Board; and that said defendants, as such stock-brokers, did cause said certificates to be sold for said Gordon, and passed the proceeds thereof to Gordon's

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credit; that at said dates Gordon represented and claimed to be the owner of the said certificates; and the defendants had no notice at any time, until the eighteenth day of December, 1877, that plaintiff owned, or claimed to own, said certificates, or either of them, or that she had any interest in either; that on the eighteenth day of December, 1877, the plaintiff demanded of the defendants the possession of said certificates of stock, and defendants refused to deliver the same; that said certificates of stock were in the usual form of certificates representing mining shares, one being in the name of and indorsed by "Cahill & Co., trustees," the other in the name of and indorsed by "Cope, Uhler & Co., trustees;" that it is the custom in the state of Nevada and in the state of California to deal in mining stocks and transfer certificates of the Ophir and other mining stocks by indorsement on the certificates in the same manner as the certificates in question were indorsed, and that such custom had prevailed from the first of January, 1877, up to the present time.

Upon this state of facts, we are of opinion that the court erred in rendering judgment in favor of the plaintiff.

The plaintiff having allowed McSweegan and Gordon to appear at different times as the true owners of said certificates of stock, with full power and control over the property, to be exercised in such a manner as to induce innocent third parties to deal with them, or either of them, as the true owner, is estopped from asserting her title to the same as against the defendants, who had no knowledge of the true state of the title.

The rights of the defendants, as stock-brokers, do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the acts of the real owner, which precludes her from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, she caused or allowed to appear to be vested in the party who delivered the certificates to the defendants.

All the authorities cited by appellant fully sustain this

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position. See also *Moore v. The Metropolitan National Bank*, 55 N. Y. 46; *Holbrook v. New Jersey Zinc Co.* 57 N. Y. 616.)

The judgment of the district court is reversed, and cause remanded for a new trial.

[No. 999.]

EX PARTE L. SIEBENHAUER.

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17	343
30*	1008
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23*	862

CONSTRUCTION OF STATUTE—INTENTION OF LEGISLATURE.—In order to reach the intention of the legislature, courts may modify, restrict, or extend the meaning of the words used in a statute so as to meet the evident policy of the act.

IDEM—ABSURD RESULTS SHOULD BE AVOIDED.—The meaning of the words may be sought by examining the context; by considering the reason or spirit of the law or the causes which induced the legislature to enact it. The subject-matter and policy of the law may be invoked, and the statute should be so construed as to avoid absurd results.

IDEM—LICENSE TAX—MEANING OF WORD "SOLICITOR."—The word "solicitor" as used in the act to reincorporate Virginia City, stat. 1879, 79, applies to individuals who are engaged or employed specially for the purpose of soliciting, importuning, or entreating for the purchase of goods as an independent occupation or business for a profit or as a means of livelihood. (Hawley, J.)

IDEM—CITY LICENSE AND COUNTY LICENSE MAY BE REQUIRED FOR THE SAME BUSINESS.—The city of Virginia, under its charter, may require a license for carrying on any trade, business or profession, although an act of the legislature also requires a license to be taken out for carrying on the same trade, business, or profession within the county, and can enforce a penalty in case of a refusal to take out such license.

ORDINANCE OF VIRGINIA CITY—LICENSE TAX VALID.—*Held*, that the ordinance of Virginia City, requiring a license tax, does not discriminate against, or in favor of, any class of citizens.

TRAVELING MERCHANT REQUIRED TO PAY A LICENSE AS A MERCHANT.—Petitioner kept a stock of goods in San Francisco, California, and comes to Virginia City, Nevada, for the purpose of soliciting orders for goods: *Held*, that the city of Virginia was authorized to impose and collect a license tax from him as a merchant. (Beatty, C. J., and Leonard, J.)

HABEAS CORPUS. The facts appear in the opinion.

Lewis & Deal, for Petitioner.

I. The charter of a municipal corporation must be strictly construed. (Sedgwick on Stat. Const. 281-83.) If there be any doubt the doubt must be resolved in favor of

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the petitioner. (1 Dillon on Munic. Corp. sec. 55 and n.) The mode and manner of taxation must be strictly followed. (1 Dillon on Munic. Corp. sec. 620.)

II. Persons in the petitioner's business are never known as, or called, solicitors. The court can not conclude that such persons were intended by the legislature.

III. The state or county under a state law collects the same kind of tax, and imposes a penalty for refusal. The city can not do the same thing. (23 Conn. 128.)

IV. The ordinance discriminates against foreign solicitors or goods brought from without the city of Virginia, and is therefore void. *Ward v. Maryland*, 12 Wall. 418, and authorities cited in *Ex parte Robinson*, 12 Nev. 271; 49 Mo. 559; Sedgwick on Construction, 360, note.)

John Knox Brown and Wm. Woodburn, for Respondent.

I. The word "solicitor" in the ordinance is not used in any sense contrary to the general meaning.

II. A municipal corporation may tax the business of such persons as may have already obtained license from the state to prosecute their respective callings. (*Wright v. Mayor of Atlanta*, 54 Ga. 645; *Simpson v. Savage*, 1 Mo. 255; 1 Dillon on Munic. Corp. sec. 53.)

III. The ordinance applies solely to persons doing business, regardless of their places of residence. By coming within the town and acting there, a person becomes liable as an inhabitant and a member of the corporation. (*Commissioners of Wilmington v. Roby*, 8 Ired. 250; *Commissioners of Edenton v. Capeheart*, 71 N. C. 156.)

By the Court, HAWLEY, J.:

1. Petitioner is a citizen of the state of California. He came from San Francisco for the purpose of soliciting orders from the merchants of Virginia City, and did obtain orders for merchandise, which orders were to be filled in San Francisco by petitioner and shipped to said merchants in Virginia City. He testifies that he and others, who are engaged in this occupation or business, are known among merchants as commercial or traveling agents, and are not

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called solicitors. He was arrested upon a complaint charging him with soliciting such orders without taking out and paying a license therefor as provided in section 2 of an ordinance of Virginia City, which reads as follows:

“Every person or firm engaged in the business of soliciting the purchase of goods, wares or merchandise within the limits of the city of Virginia, to be sent to said city of Virginia from places beyond the limits of said city, or upon orders to be filled elsewhere than in said city, and every person bargaining or selling any goods, wares, or merchandise, by sample or otherwise, in said city, where the same are to be sent to said city from beyond its limits, shall be deemed a solicitor and shall pay quarterly for a license to carry on said business, according to the monthly receipts or sales of such solicitors,” as set forth in a schedule.

Section 3 of said ordinance provides that any person, firm or association who shall be engaged in said business without having first taken out a license therefor shall, upon conviction, be punished by a fine or by imprisonment in the city jail, as therein prescribed.

The authority for the passage of said ordinance is derived from the act of the legislature “approved March 6, 1879,” which gives to the board of aldermen power “to fix and collect a license tax on and regulate * * * solicitors.” (Stat. 1879, 79.)

The statute does not attempt to define the word “solicitors.” Lexicographers give it two meanings. First. One who solicits, importunes, entreats, or asks with earnestness; one who solicits for another. Second (law). An attorney or advocate; a person admitted to practice in courts of chancery or equity.

Under the code and practice in this state, the term solicitor is never applied to attorneys-at-law. It relates to attorneys practicing in the federal courts in chancery or equity. We think it is manifest that the word solicitors, as used in the statute, was not intended to apply to attorneys-at-law.

Counsel for petitioner claim that its meaning is too vague, general, and indefinite to enable the court to determine who

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was intended. It is undoubtedly true that the first definition, as above given, applies, in its general and broadest sense, to all persons who solicit orders or favors of any kind or character. To so apply it would lead to manifold absurdities. It would, if so construed, authorize the municipality of Virginia City to fix and collect a license tax upon every individual who might, at any time, be called upon to solicit money for political, charitable, religious, and many other similar purposes. But it does not necessarily follow that we are bound to give to the word any meaning that would lead to such absurdities.

Our duty begins and ends with determining the meaning intended by the legislature. If that can be ascertained by any legal means, we are compelled to so construe it as to give effect to the intention of the legislature. This principle is cardinal and universal.

In order to reach the intention of the legislature, courts are not bound to always take the words of a statute either in their literal or ordinary sense, if by so doing it would lead to any absurdity or manifest injustice, but may in such cases modify, restrict or extend the meaning of the words so as to meet the plain, evident policy and purview of the act and bring it within the intention which the legislature had in view at the time it was enacted. (*Gibson v. Mason*, 5 Nev. 285; *Reiche v. Smythe*, 13 Wal. 164; *Burgett v. Burgett*, 1 Ohio, 480; *McIntyre v. Ingraham*, 35 Miss. 52; *Camp v. Rogers*, 44 Conn. 291; *Castner v. Walrod*, 83 Ills. 178; *Fisher v. Patterson*, 13 Pa. St. 338; Bishop on Statutory Crimes, section 212.)

The meaning of words used in a statute may be sought by examining the context and by considering the reason or spirit of the law or the causes which induced the legislature to enact it. The entire subject-matter and the policy of the law may also be invoked to aid in its interpretation, and it should always be so construed as to avoid absurd results. (*Roney v. Buckland*, 4 Nev. 45; *State ex rel. Keith v. D. and V. T. R. R. Co.*, 10 Id. 155; *Silver v. Ladd*, 7 Wal. 219; *State v. Judge*, 12 La. An. 777; *State v. Mayor etc.*, 35 N. J. L. 196.)

Plowden says that the "intent of statutes is more to be regarded and pursued than the precise letter of them, for oftentimes things which are within the words of statutes are out of the purview of them, which purview extends no further than the intent of the makers of the act, and the best way to construe an act of parliament is according to the intent rather than according to the words." (2 Plowden's Rep. 464.)

Can we, by applying these or any other well-recognized rules of construction, ascertain the meaning which the legislature intended should be given to the word "solicitors"? The evident object of the law was to authorize the board of aldermen of Virginia City to fix and collect a license tax upon every kind and character of business that might be conducted or carried on within the corporate limits of said city. The act names almost every conceivable sort of occupation or business: "Auctioneers, assayers, barbers, bootblacks, bootmakers, * * * cobblers, brokers, factors, * * * general agents, * * * grocers, merchants, traders, * * * manufacturers, * * * public criers, bellringers, * * * solicitors, tailors, * * * tradesmen, artisans, * * * and stock brokers."

What was meant, in this connection, by the word "solicitors"? The other words apply to individuals who conduct or carry on some particular occupation or business. Does not this fact afford a key which will unlock and throw open the true meaning and intention of the legislature with reference to the word "solicitors"? In my opinion this word has the same specific meaning as the other words; that is, it applies to all individuals who are engaged or employed specially for the purpose of soliciting, importuning or entreating for the purchase of goods, etc. It is an independent occupation or business. The legislature only intended to reach those persons who might be employed in this particular business as a means of making a living. The assayers, barbers, and bootblacks, as well as the tailors, merchants, and tradesmen, solicit custom in their respective callings, but they are only required to take out a license as assayers, etc., to enable them to carry on and conduct their

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particular occupation or business. The word solicitors, as used in the ordinance, does not apply to them from the mere fact that in conducting their business they solicit custom from the public.

In *Joyce v. City of East St. Louis*, the charter gave the city power "to license, tax, and regulate and control wagons and other vehicles conveying loads in the city." Joyce kept a family grocery store, and used a one-horse spring wagon, without having any license therefor, in delivering goods sold to his customers. He did not use the wagon for hire, nor in any other manner than in the prosecution of his business as a grocery merchant. The court said it was not intended by the charter to fix a tax upon such vehicles "as should only be used by persons in the prosecution of their ordinary private business," and that the true construction of the charter "does not authorize the licensing of all vehicles conveying loads in the city, but such, only, of them in respect to which it is proper and customary with municipal authorities to prescribe the rates of carriage, viz., those used * * * by common carriers in the city for hire." (77 Ill, 158.)

Of course, if any person combines within himself more than one distinct occupation or business, he could be compelled to take out a license for each occupation or business. (*Neal v. Commonwealth*, 21 Gratt. 519.) To determine this question, the good faith of the party may often be involved. (*Carter v. The State*, 44 Ala. 31.) But in every case, it is only the occupation or business that is taxed. The mere fact that a clerk, merchant or other person solicits orders or favors in their line of business, does not necessarily bring them within the law authorizing a license tax to be imposed upon solicitors.

The law means persons engaged in that particular class of business for a profit, or as a means of livelihood. (*Weil v. State*, 52 Ala. 19; *Gillman v. State*, 55 Id. 248; *Commonwealth v. Gee*, 6 Cush. 179; *Merriam v. Langdon*, 10 Conn. 468.)

It may be admitted that the legislature did not select the most appropriate word to express their actual meaning.

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Traveling merchants or commercial agents would perhaps have been better; but, as was said by this court in *Thorpe v. Schooling*, “the intention of the legislature controls the courts,” and “whatever that body manifestly intended, is to be received by the courts as having been done by it, provided it has in some manner, no matter how awkwardly, indicated or expressed that intention.” (7 Nev. 17.)

Taking a plain, common-sense view of the statute, and keeping within the well-defined canons of construction, it seems to me that the word “solicitors,” as used in the statute, does apply, and was by the legislature intended to apply, to that class of persons, of whom petitioner is one, whose occupation and business as conducted within this state is that of a solicitor, and that by virtue of said act the board of aldermen had authority to pass said ordinance, and that the courts are bound in such cases to sustain and enforce its provisions.

2. The city of Virginia, authority therefor being given in its charter, may require a license for conducting or carrying on any trade, business, or profession within its corporate limits, although an act of the legislature also requires a license to be taken out for conducting or carrying on the same trade, business, or profession within the county, and can enforce a penalty in case of a refusal to take out such license. (1 Dillon on Municipal Corporations, sec. 53; *Simpson v. Savage*, 1 Mo. 359; *Ambrose v. State*, 6 Ind. 351.) There are cases, like that of *Southport v. Ogden*, 23 Conn. 132, cited by petitioner’s counsel, where the offense consists in the commission of an act also prohibited by the general law of the state, where the courts have held that, by the passage of the general law, the legislature intended to assume the exclusive regulation of such acts, and that if the by-laws of the city were sustained, and if the prosecution and conviction of a person under the general law would not be a bar to a subsequent prosecution for the same act under the by-law, the consequence would be that such person might be tried and punished twice for the same offense, and upon this reasoning the by-laws were declared invalid. (*Jenkins v. Mayor*, 35 Ga. 145; *Town of Washington v. Ham-*

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mond, 76 N. C. 34.) But in cases like the present no such reason or results follow. If petitioner refuses to take out either a county or a city license, and should be prosecuted and convicted in both cases for such refusal, he would not be twice convicted for the same offense. The conviction, in each case, is for an act of omission upon the part of petitioner. In one case it is his refusal to take out a county license as the law requires. In the other case it is his refusal to take out a city license as required by the ordinance. The law requiring parties to take out a county license does not, in our opinion, in any manner conflict with the law authorizing the municipality of Virginia City to pass an ordinance requiring such persons to also take out a city license.

We have not been referred to any authority, and we do not believe any can be found, in opposition to the views herein expressed.

The great weight of authority seems to sustain the position as stated by Cooley, that "the same act may constitute an offense against both the state and municipal corporation, and may be punished under both without any violation of any constitutional principle." (Cooley on Constitutional Limitations, 199, and authorities there cited; *Howe v. Treasurer of Plainfield*, 37 N. J. L. 145.)

3. The ordinance does not discriminate against, or in favor of any class of citizens. It applies to all persons, irrespective of their place of residence, who may be engaged in the business therein designated, within the corporate limits of the city. (*Ex parte Robinson*, 12 Nev. 271.)

Petitioner is remanded into custody.

BEATTY, C. J., and LEONARD, J., concurring:

It is unnecessary, in my opinion, for the purpose of deciding this case, to ascertain the meaning of the word "solicitors," as employed in the amended charter of Virginia City. It is admitted that the petitioner is a traveling merchant—that is, he keeps a stock of goods in San Francisco and comes to Virginia City for the purpose of soliciting orders. He carries on the business of selling

Argument for Appellant.

goods in Virginia City, and he is none the less a merchant doing business there because he keeps his stock of goods in another state and travels about from place to place. The charter empowers the city of Virginia to impose a license tax upon merchants, and the class of persons described in the ordinance are merchants. It is of no consequence that the ordinance calls them "solicitors." If the city has authority to tax them as merchants, it may call them by any name it pleases.

Upon the other points discussed, I concur in the opinion of Justice Hawley, and I concur in the judgment.

[No. 973.]

THE BANK OF CALIFORNIA, APPELLANT, v. W. S. WHITE ET AL., RESPONDENTS.

WRITTEN CONTRACT—WHEN MAY BE VARIED BY PAROL EVIDENCE.—

Defendants were jointly liable, under a written contract, to H. and B. for the construction of the International Hotel. Plaintiff loaned defendant White certain money, which was used in the construction of said building, and brought suit against all the defendants as partners. On the trial, each of the defendants, other than White, was allowed to testify that he was not a partner with the defendant White; that he had no account with plaintiff, and that he had nothing to do with the contract except as a bondsman: *Held*, that this evidence was properly admitted.

LOEM.—The rule that parol evidence is not admissible to vary the terms of a written contract, is confined in its operation to the parties to the contract, their representatives, and those claiming under them; it has no application against any party who is a stranger to the instrument.

IDEM.—BOTH PARTIES MUST BE BOUND.—Unless both parties are bound by the contract, either is at liberty to show, by parol, a different state of facts from that set out in the writing.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts sufficiently appear in the opinion.

Whitman & Wood, for Appellant.

I. Even under the evidence of defendants, the contract constituted them partners in the special enterprise between

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themselves, though White was to have all the profits, as there was a joint venture, with a joint liability to loss.

But, if not partners between themselves, they were so as to the world at large, or at least that portion of the world which contributed by money, labor, or material, to the advancement of the joint enterprise; and it can make no difference that the business was carried on in the name of White, or that the money was advanced in his name. (*Braches v. Anderson*, 14 Mo. 442, side paging.)

II. There is no equity superior to the writing to be shown here.

The contract is plain, precise, and without ambiguity; there is no excuse for an attempt to alter it, or vary the relation of defendants to it. (*Auburn Bank v. Leonard*, 40 Barb. 119; *Babbett v. Young*, 51 N. Y. 238.)

Stone & Hiles, and *R. H. Taylor*, for Respondents.

I. There was nothing in the conduct of the respondents which tended to show that they were holding themselves out, to appellant or to the world, as partners in business, or as joint contractors in the building of the hotel.

The signing of the contract by them was for the benefit and protection of Hanak and Bateman alone; the appellant is a stranger to that agreement, and can not claim anything under it. (*Hedges v. Bowen et al.*, 83 Ills. 161.)

II. The general rule that parol evidence is inadmissible to contradict or vary the terms of a written instrument, applies only to parties to the instrument and those claiming under them. (*Smith v. Moynihan*, 44 Cal. 63; *Husmann v. Wilke*, 50 Id. 250; *Reynolds v. Magness*, 2 Ire. 30; *Greenleaf on Evidence*, sec. 279; *Sargent v. Collins*, 3 Nev. 260.)

By the Court, HAWLEY, J.:

On the fourth day of May, 1876, the defendants, W. S. White, Owen Fraser, David Crosby, R. J. Breed, and B. H. Carrick, entered into a written contract with A. Hanak and I. Bateman, to build and complete the building in Virginia City known as the International Hotel.

While said contract was in force, the plaintiff loaned and

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advanced to the defendant White the sum of twelve thousand two hundred and thirty-eight dollars, which was used in and about the construction of said building.

The money was loaned to White individually, but the loan was made with knowledge of the terms of the written contract.

Appellant brought this suit to recover of and from all of the defendants the amount so loaned, and claims that defendants were partners in said contract for building said hotel, and are jointly liable for the payment of said sum of money.

The district court gave judgment in favor of the plaintiff against defendant White, and in favor of the other defendants for their costs.

On the trial, each of the defendants—other than White—testified in his own behalf that he was not a partner with the defendant White, and never had been; that he had no account in connection with him with the Bank of California; that he signed the contract for building the International Hotel as a guarantee that defendant White would build the same in accordance with the terms of the contract; that he had nothing to do with purchasing any materials for building the hotel, nor with borrowing any money, nor in the employment of any one in its construction, nor did he ever receive any money on account thereof, and had nothing to do with the contract, except as a bondsman. The plaintiff objected to the testimony of said defendants, on the ground that it was calculated to impeach and vary the writing, and that it was incompetent for the defendants to alter, or attempt to alter, their *status* as fixed by the contract.

These objections were overruled, and exceptions taken.

Did the court err in admitting this testimony?

Under the terms of the written contract, the defendants were jointly liable to Hanak and Bateman for the fulfillment of the contract, and, as against them, would not, under the law, be allowed to vary their obligation by parol. But this general rule of evidence is always confined in its operation to the parties to the contract, their representatives, and those claiming under them.

Points decided.

It has no application whatever as against any party who is a stranger to the instrument. (Greenl. on Ev., sec. 279; *Krider v. Lafferty*, 1 Whart. 314; *Woodman v. Eastman*, 10 N. H. 359; *Edgerly v. Emerson*, 3 Fos. 565; *Furbush v. Goodwin*, 5 Id. 453; *Hughes v. Sandul*, 25 Tex. 165; *Blake v. Hall*, 19 La. An. 52; *Talbot v. Wilkins*, 31 Ark. 420; *Van Eman v. Stanchfield*, 10 Minn. 265; *Hussman v. Wilke*, 50 Cal. 251.)

The Bank of California was not a party to the contract and is not bound by it. It was at liberty to show, if it had so desired, that the written contract did not disclose the true *status* of the respective parties.

As it could not be bound by the terms of the contract, the defendants were at liberty to show the true character of the transaction. Unless both parties are bound, either is at liberty to show, by parol, a different state of facts from that set out in the writing. (*Reynolds v. Magness*, 2 Ire. 30; *Venable v. Thompson*, 11 Ala. 148; *Strader v. Lambeth*, 7 B. Mon. 590; *Smith v. Moynihan*, 44 Cal. 64; *McMaster v. Insurance Co. of N. A.* 55 N. Y. 234.)

The ruling of the court in admitting the testimony of defendant was correct.

The judgment of the district court is affirmed.

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[No. 901.]

A. M. COHEN, RESPONDENT, v. EUREKA AND PALISADE RAILROAD COMPANY, APPELLANT.

ACTION AGAINST RAILROAD COMPANY—NONSUIT—WHEN SHOULD NOT BE GRANTED—QUESTIONS OF FACT.—Plaintiff and his companions were strangers in Eureka, and ignorant of the existence of the defendant's railroad. At the close of the plaintiff's case, there was no evidence to show that plaintiff could have seen the train, as it approached the crossing, in season to avoid the accident, except that other people in different localities, near where the collision occurred, heard and saw the approaching train in time to have avoided the accident: *Held*, that a nonsuit was properly refused.

IDEM—RIGHTS OF STRANGERS.—The fact that plaintiff and his companions were strangers in Eureka, and did not know they were approaching a railroad crossing, was an important fact to be considered by the jury.

Statement of Facts.

IDEM—CONTRIBUTORY NEGLIGENCE.—The testimony upon the part of the defendant tended to show that if the plaintiff, or any of his companions, had looked and listened, they could have seen and heard the approaching train in time to have avoided the accident: *Held*, upon a review of all the testimony, that the question whether or not plaintiff was guilty of contributory negligence, was properly submitted to the jury as a question of fact.

EVIDENCE SUFFICIENT TO SUSTAIN VERDICT.—Rule as to substantial conflict of evidence enforced.

REASONABLE CARE—NEGLIGENCE.—At the request of plaintiff, the court gave the following instruction to the jury: "No. 4. You are instructed, that if you believe, from the evidence, that the plaintiff, at or about the time set forth in the complaint, was traveling upon the road which is crossed by the track of the defendant, and was exercising reasonable care for his own safety, and in attempting to cross the railroad track of the defendant, the wagon, upon which the plaintiff was riding, was overturned by the cars of the defendant; and that, at the time that said accident occurred, the said defendant was operating their said cars and locomotive in a negligent manner, or neglected to ring the bell, or blow the whistle, or otherwise signal their approach, and, by reason of such neglect, the plaintiff was injured, you will find a verdict for the plaintiff:" *Held*, correct.

DAMAGES—WHAT MAY BE CONSIDERED.—The court, at plaintiff's request, gave the following instruction: "No. 5. You are instructed, that if you find for the plaintiff, in assessing damages, you will take into consideration, not only the cost of medical treatment and loss of time which the plaintiff has sustained, but also his bodily suffering; and, if the injury is permanent, such damages as he may sustain by reason of such suffering, as well as his incapacity for earning money in the future:" *Held*, correct.

RIGHTS AND DUTIES OF TRAVELER AND OF RAILROAD COMPANY—EQUAL.—The court instructed the jury, "That where a railroad is crossed by any street, road, or public highway, the rights of the traveling public and the railroad company, to the use of said crossing, are equal, and both parties are bound to use ordinary care, the one to avoid committing, and the other to avoid receiving, an injury:" *Held*, correct.

IDEM—SPEED OF THE TRAIN.—The court instructed the jury, that it is the duty of the employes of a railroad company "to approach the crossing at such rate of speed as would enable them to check the train, if necessary:" *Held*, erroneous.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The reason given by the court for the refusal of the fifth instruction asked by appellant (referred to in the opinion)

Statement of Facts.

was: "That the law asked for has been given in the instructions asked for as modified by the court."

The fourth and fifth instructions given for respondents, and referred to in the opinion, are inserted in full in the head notes.

The second, twelfth, fourteenth, and fifteenth instructions asked by appellant, read as follows:

2. "You are instructed that it is the clear duty of a person as he comes near to and upon a railroad crossing, to use all proper precautions to avoid injury, and the least he can do is to look in both directions; if he does not do so, and the omission contributes to his injury, he is guilty of such negligence as will bar his recovery, notwithstanding the negligence of those in charge of the train in omitting to sound the whistle or ring the bell."

12. "You are instructed that it is the duty of every person approaching a railroad track to look for and to see the track itself, if visible to a person of ordinary eyesight; and if you find from the evidence that the accident in this action was primarily due to the fact that the plaintiff's driver was negligent in looking for and seeing the track itself as he approached the crossing, then your verdict must be for the defendant."

14. "You are instructed that persons approaching the track of a railroad are bound to use their eyes in looking for a track; and if you find that the driver of the plaintiff's wagon did not see the track at all as he approached it, if the track was visible, it is a circumstance indicating such negligence on the part of the driver, as would prevent a recovery by plaintiff in this action."

15. "You are instructed that if you find from the evidence that the driver of the plaintiff's wagon, and the witness, Algyn, were engaged in talking to each other, as they approached the railroad crossing, and neither looked nor listened for any sign of approaching danger, nor for the track itself, such conduct is evidence of negligence sufficient in itself to bar a recovery by plaintiff in this action."

The district judge modified the second, twelfth and fourteenth, by the addition of the following sentence: "This

Argument for Appellant.

is true, provided the plaintiff, or the driver, knew of the existence of the railroad track, or it could be seen by them, or ought to have been seen by a prudent man."

The fifteenth was modified by adding the following: "Provided that the plaintiff or the driver knew that the track was there, or it could be seen by them if they had looked for it, or that there was no obstruction which prevented them from seeing the coming train."

Thomas Wren, Crittenden Thornton, and C. J. Lansing,
for Appellant.

I. The evidence was insufficient to justify the verdict, and the court erred in overruling defendant's motion for a nonsuit. There is no substantial conflict of evidence upon any material issue. The rule that appellate courts will not interfere with the verdict where there is a substantial conflict of evidence is only applied where there is a real and substantial conflict upon material points, and has no application where the conflict is more apparent than real, or does not relate to controlling issues. (*Rice v. Cunningham*, 29 Cal. 495; *Lyle v. Rollins*, 25 Id. 440.)

If the plaintiff's cause of action, or the defendant's defense, be proved by a single witness, who stands unimpeached before the jury, and his testimony not denied, it must be received as true. In such a case, the court may direct the jury in terms to find for one party or the other. (1 Phillips' Evidence, C. & H.'s Notes, 4th Am. ed. 711-12; *Newton v. Pope*, 1 Cowen, 109; *Beekman v. Bennis*, 7 Id. 29; *Saville v. Lord Farnham*, 2 Mann. & Ryland, 216; *Nichols v. Goldsmith*, 7 Wendell, 160; *Demyer v. Souzer*, 6 Id. 436.)

The testimony of witnesses apparently inconsistent is always to be so construed as, if possible, to exempt them from the imputation of perjury. (*Johnson v. Scribner*, 6 Conn. 185; *Woodcock v. Bennet*, 1 Cowen, 750.)

The testimony of witnesses that they did not hear the bell is not entitled to any weight against the positive evidence of other witnesses, unless it appears that they were looking, watching and listening for the bell to ring. (*Stevens v. Oswego and Syracuse R. R. Co.* 18 N. Y. 424; *Culhane v.*

Argument for Appellant.

N. Y. C. & H. R. R. Co. 60 Id. 137; *Beiseigel v. N. Y. C. R. R. Co.* 40 Id. 19; *Wilds v. Hudson River R. R. Co.* 29 Id. 329.)

The following facts were established in this case beyond controversy:

1. The plaintiff and his fellow travelers were riding together on a straight road, in broad daylight, in the direction of a railroad track, which ran at right angles to their line of approach.

2. At any point within ninety feet of the track, the railroad was visible for a distance of two hundred and forty feet in length, and was raised above the level of the surrounding country, on an embankment of from three to five feet in height.

3. Neither the plaintiff nor his fellow-passengers saw the track, or looked for it.

4. The only reasons for their not seeing it, were their inattention as to where they were going, and talking among themselves.

5. The noise of the approaching train was distinctly audible, heard, in fact, by others at ten times greater distance from the train than the plaintiff and his companions, and which ought to have been heard by the latter.

6. The speed of the train was certainly not more than eight miles an hour, and that of the team equally fast.

7. The bell on the train was ringing up to the instant of the accident.

If the first six of the facts above stated are correct, or if the seventh is established, then the conclusion of contributory negligence upon the part of the plaintiff is unavoidable. Where the facts are admitted or established by uncontradicted evidence, the question of negligence is a matter of law for the court. (*Gavitt v. Manchester & Lawrence R. R.* 16 Gray, 505; *Flemming v. Western Pacific R. R.* 49 Cal. 257; *Pittsburg R. Co. v. McClurg*, 56 Pa. St. 294; *Beiseigel v. N. Y. C. R. R.* 40 N. Y. 19; *Solen v. Virginia and Truckee R. R. Co.* 13 Nev. 107.)

A person approaching a railroad-crossing must use his eyes and ears to detect and perceive even apprehended

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peril from trains. (*Baxter v. Troy & Boston R. R.*, 41 N. Y. 502; *Ernst v. Hudson River R. R.*, 39 Id. 61; *Wilcox v. Rome, W. & O. R. R.*, Id. 358; *Grippen v. N. Y. C. R. R.*, 40 Id. 34; *Gaynor v. Old Colony R. R. Co.*, 100 Mass. 208; *Butterfield v. Western R. R. Co.*, 10 Allen, 532.)

If the place of danger is visible to the person approaching it, such person cannot excuse himself upon the plea that he was not aware of its existence. A railroad-crossing is a place of danger, and common prudence requires that a traveler on the highway, as he approaches one, should use the precaution of looking to see if a train is approaching. (*Allyn v. Boston & Albany R. R. Co.*, 105 Mass. 77; *Gaynor v. Old Colony & Newport Railway Company*, 100 Id. 208; *Baxter v. Troy & Boston R. R. Co.*, 41 N. Y. 502.)

II. The court erred in refusing to give the fifth instruction requested by defendant. This instruction stated the law correctly. (*Butterfield v. Forrester*, 11 East, 60; *Gay v. Winter*, 34 Cal. 153; *Needham v. S. F. & S. J. R. R.*, 37 Id. 419; *Robinson v. Western Pacific R. R.*, 48 Id. 423.) There is no remedy for an injury which is the consequence of negligence on both sides. (*Wynn v. Allard*, 5 Watts & S. 524; *Simpson v. Hand*, 6 Whar. 311; *Fox v. Glastonbury*, 29 Conn. 204.) Where the negligence of the two parties is contemporaneous, and the fault of each relates directly and proximately to the occurrence from which the injury arises, the plaintiff cannot recover, if by due care on his part he might have avoided the consequences of the carelessness of the defendant. (*Lucas v. New Bedford R. R. Co.*, 6 Gray, 64; *Waite v. North Eastern R. R. Co.*, 1 Ellis, Blackburn & Ellis, 719; *Robinson v. Cone*, 22 Vt. 213; *Troy v. Vermont Central R. R.*, 24 Id. 487; *Birge v. Gardiner*, 19 Conn. 507; *Button v. H. R. R. Co.*, 18 N. Y. 248; *Greenland v. Chaplin*, 5 Exch. 243.)

III. The allusion as to the rate of speed in the third instruction asked by plaintiff was unnecessary and misleading.

IV. The court erred in modifying the second, twelfth, fourteenth, and fifteenth instructions asked by defendant. These instructions simply declared the legal proposition

Argument for Respondent.

that a man approaching a railroad track in broad daylight which is in full view for a hundred feet before he reaches it, must see the track. If he does not, it is gross negligence. Any danger which is conspicuous must be seen. An omission to look is negligence. To look and to see is an imperative duty. (*Gilman v. Inhabitants, etc.*, 15 Gray, 580; *Hill v. Seekonk*, 119 Mass. 88; *Fullon v. City of Boston*, 3 Allen, 38; *Raymond v. City of Lowell*, 6 Cush. 535; *Cox v. Westchester Turnpike Company*, 33 Barb. 418.) In modifying these instructions, the district judge confused what was clear, and repeated that which needed no repetition, in multiplying excuses for the plaintiff which had no foundation in the evidence, and no necessary relation to the case presented to the jury.

R. M. Beatty and G. W. Baker, for Respondent.

I. The evidence is sufficient to justify the verdict. The court did not err in refusing to grant a nonsuit.

1. A man driving along a public road is not compelled to stop his team and run ahead and look up and down a railroad track and into a long deep cut to ascertain whether the train is coming or not, although he may know that the track is there, and trains frequently pass the point where he wishes to cross, and much less is he required to do so when he does not know, and as a prudent man can not know, that even the track is there.

2. A railroad company is compelled by law to signal the approach of its trains to a crossing, and our statute provides a particular signal or warning, namely, that a bell be rung.

3. The failure to ring the bell or give other sufficient warning under the peculiar circumstances of this case, was gross negligence.

4. The jury, by their verdict, decided that defendant did not ring the bell, or give other signal of their approach.

5. If the bell did not ring, and the servant of defendant saw plaintiff's team at a distance of twenty-five feet from the track, with the driver's attention attracted away, and did not use any endeavor to warn the plaintiff of his danger,

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his failure in this of itself is gross negligence upon the part of defendant sufficient to entitle the plaintiff to recover.

6. To warrant this court in ordering a new trial, it must appear that if defendant had admitted that the bell was not rung, and no signal or notice given of the approach of the train, plaintiff could not recover.

The failure to give any signal of the approach of defendant's train of cars, at this crossing, was established by the clear weight of evidence, and is fortified by the verdict of the jury, and therefore ceases to be a debatable question in this court. (*State v. Yellow Jacket Mining Co.*, 5 Nev. 415; *Lewis v. Wilcox*, 6 Id. 215; *Longabaugh v. V. & T. R. R. Co.*, 9 Id. 302; *State v. C. P. R. R. Co.*, 10 Id. 49; *Solen v. V. & T. R. R. Co.*, 13 Id. 106.)

The numerous authorities cited by appellant contain no legal principles in opposition to the verdict of the jury in this case.

II. The third instruction is not erroneous. The testimony shows the crossing was a public one. This justified the giving of this instruction. (*Kennayde v. W. P. R. R.*, 45 Mo. 262; *Delany v. Mil. & St. P. R. R.*, 33 Wis. 71; *K. P. R. R. v. Pointer*, 9 Kan. 623; *Shearman & Redfield on Negligence*, sec. 491; *Solen v. V. & T. R. R.*, 13 Nev. 106; *Continental Imp. Co. v. Stead*, 5 Otto [95 U. S. Supreme Ct.] 161.)

III. The fifth instruction asked by defendant was erroneous. The principle asserted, that it must be shown that the plaintiff was free from negligence, presupposes the necessity of the plaintiff establishing by his own evidence the absence of negligence in himself; and it was therefore properly refused. (3 Saw. 446; 48 Cal. 409; 15 Wall. 401; *Shearman & Redfield on Negligence*, sec. 34; 16 Pa. St. 463; 29 N. J. Law. 544; *Needham v. S. F. & S. J. R. R.*, 37 Cal. 409.)

By the Court, LEONARD, J.:

Appellant seeks a reversal of the judgment in this case: First, because of the refusal of the court to nonsuit the plaintiff, upon the ground that his own negligence con-

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tributed to the injury complained of, and that the evidence was insufficient to justify the verdict; and second, upon exceptions to the charge to the jury.

Respondent was injured by appellant's cars while attempting, with a team, to cross appellant's railroad track in the town of Eureka, and this action was brought to recover damages for such injury.

He recovered judgment for one thousand eight hundred and seventy-five dollars.

This appeal is taken from an order denying appellant's motion for a new trial, and from the judgment.

Before any witnesses were examined, by consent of both parties, the court and jury visited and inspected the place of the accident, at which time a train of cars was run over the road. All the material testimony, and all the instructions given, are contained in the transcript. A map of the scene of the accident, which was before the court and jury, is not before us.

The testimony given on behalf of respondent, before appellant's motion for a nonsuit, showed the following facts:

On the morning of October —, 1877, respondent, with two men, named Algin and Lawrie, the latter having been his driver, were riding in a two-horse covered wagon from Eureka to Ruby Hill. The blinds on the side of the wagon were rolled up. The driver and Algin were sitting on the front seat, while respondent was upon the back seat. They were strangers in Eureka, and did not know of the existence of the railroad. As they approached the crossing, Algin and Lawrie were talking, and none of them looked for, or saw, the railroad or the crossing. The horses were trotting. As the team came to the crossing appellant's train struck it, upset the wagon and seriously injured respondent. No one in the wagon saw the track until the collision. The engine was in the rear of the train, which was running at about its usual rate of speed, say eight miles an hour. The cars were flat, and were used for carrying ore from the mines. South of the crossing the cars passed through a cut. Neither of the persons in the wagon heard any bell or whistle, or the noise of the train. Other persons differently situated heard

the train, but none of them heard either bell or whistle. Respondent testified: "I am positively certain the bell was not rung; if so I should have heard it." Algin did not hear the bell or whistle, and said if the bell had been rung they would have heard it. Quantrell, who was working at Fiske's house, 150 feet north of the crossing, heard neither bell nor whistle, and would have heard them had they been sounded. Mrs. Fiske was certain the bell was not rung or the whistle blown, otherwise she would have heard them. Mrs. Combs knew the bell was not rung or the whistle blown, or she would have heard them.

The crossing was made some time in 1874, or thereabouts, by Mr. Shaw, president of the Eureka Consolidated Mining Company, which built and then owned the road. It was made for the use, and at the request, of Mr. Chandler, the witness. When first made, it was not a public crossing; as at that time no one resided on the west of the track. Afterwards, however, houses were built on that side, and the people used it as a crossing. For the accommodation of the people, Mr. Shaw changed the road leading through Clark street to that point, for the reason that the crossing in question was more convenient than the one where Clark street crossed.

After proof of the above facts by respondent, appellant moved for a nonsuit, upon the ground before stated, and now claims that the court erred in refusing it. This alleged error may be summarily disposed of.

In their brief, counsel for appellant say:

"We do not contend that the burden of proof devolves upon the plaintiff to show diligence or freedom from negligence. But if, upon the whole evidence, all care, diligence, heedfulness, vigilance, and caution appear to be lacking, the plaintiff can not recover." It can not, therefore, be claimed that appellant was entitled to a judgment of nonsuit, if a *prima facie* case of negligence on its part was clearly established, unless respondent's evidence also showed, that by his own negligence or want of ordinary care and caution, he so far contributed to the injury complained of, that but for such negligence or want of care and caution, the injury

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would not have happened. (*Solen v. V. & T. R. R. Co.*, 13 Nev. 126-128.)

That the testimony given for respondent showed that no bell was rung or whistle blown, can not be doubted. Under the statute, a failure to ring the bell for a distance of at least eighty rods from the place where the railroad crosses any street, road, or highway, is negligence *per se*. It is true that one or two of respondent's witnesses merely said: "I did not hear the bell," while the rest said, either, "I did not hear it, but if it had been rung I should have heard it;" or "I am positive that it did not ring; if it had I should have heard it;" but the witnesses were in position to hear, and their testimony was just as positive as such testimony can ever be. It was just as positive as it would have been had it not been fortified by the statement, "if it had been rung I should have heard it." It was much more than a mere, "I did not hear." No honest witness could have testified as several did, without saying in substance: "The bell was not rung. My reasons for so testifying are, that it could not have been rung without my hearing it, and I did not hear it." What has been said in relation to the ringing of the bell is equally true of the blowing of the whistle. Two witnesses were just as positive that the latter was not blown as they were that the first was not rung.

A *prima facie* case of negligence on the part of appellant was clearly established, and damages resulting from the accident were shown by respondent's testimony. It now remains to be considered whether or not respondent's testimony also showed, by clear and undisputed facts, such contributory negligence on his part, that he should not recover.

When he rested, there was no evidence tending to show that any portion of the railroad was visible to a person approaching the track in a wagon from the east, or that respondent and his driver could have seen any portion of it, before they did, if they had looked for it. Proof that respondent and his driver did not look for or see the railroad, without also showing that they could have seen it if they had looked, did not tend even to prove contributory negligence.

Nor was there any evidence that respondent could or should have seen the train, as it approached the crossing, in season to avoid the accident. Other people in different localities saw it before it reached the crossing; but that fact did not tend to show that respondent could or should have seen it; other persons differently situated heard the train; but there was no evidence that plaintiff could or should have heard it. Besides, it was in proof that the engine was in the rear of the train as it was approaching the crossing through the cut. Under such circumstances, especially in view of the further fact that respondent and his companions were strangers and ignorant of the existence of the railroad, it was for the jury to decide, from all the facts and circumstances, whether or not respondent contributed to his injury. *Commonwealth v. Fitchburg R. R. Co.*, 10 Allen, 191, 192; *Solen V. & T. R. R. Co.*, *supra*; *Bunting v. Central Pacific R. R. Co.*, recently decided by this court.

The motion for a nonsuit was properly denied. But it is contended that the evidence is insufficient to justify the verdict, because the whole evidence shows that the appellant was *not* negligent and that respondent *was*. It is conceded that the proof of the latter consists only in the omission of respondent and his companions to see the track, if it was visible. To contradict the claim of negligence on its part, appellant introduced a witness, who was riding on the cow-catcher of the locomotive at the time of the accident, the engineer in charge of the train, and two brakemen upon the same. They all testified that the bell was rung for a greater distance than the statute requires. The engineer stated that he did not sound the whistle, while one brakeman testified that it was sounded.

Upon the whole testimony in relation to the ringing of the bell, or giving other signal, little need be said. First, there was much to sustain the verdict upon this point; and, second, there was a substantial conflict of testimony upon this material issue. Unless it shall appear that the court erred in its instructions to the jury, we shall consider appellant's negligence established by the verdict.

We now come to the question of respondent's omission to

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see the track. Can this court say from the whole case as presented, as a question of law, that the omission was such negligence on his part, that he ought not to recover, although it be true that appellant's negligence is fully established? There is no proof or pretense that the track in the cut, or the train when passing therein, could have been seen by respondent. It was only fifteen feet from the north end of the cut to the crossing. But it is contended that respondent ought to have seen eighty yards of the track north of the cut which was in sight. Mr. Rock, a civil engineer, testified as follows for appellant: * * * "I made the map of the scene of the accident which is now on the blackboard (in court). It was made by actual measurement by myself, and is correct. * * * The road laid down on the map which crosses the railroad track from the east, is the road on which plaintiff's wagon came up to the crossing. This road, as laid down on the map, is about seventy-five or eighty feet long, and is slightly up hill all the way. This road crosses the track very nearly at a right angle. * * * From the mouth of the cut running north, the track is in sight for nearly eighty yards. It is upon an embankment of an average height of three to five feet. It is in sight for that distance from any point on the road coming from the east as you approach the track." Upon the above testimony, which was uncontradicted by any evidence given in court, counsel for appellant claim that this court should declare, as a question of law, that respondent was guilty of contributory negligence, and cannot recover. This is the interesting portion of the case; but we entertain no doubt as to our duty. This case, like all others of its kind, must be decided upon its own facts and all the circumstances surrounding it. That a case might arise where a stranger crossing, or attempting to cross, a railroad track at a regular crossing, would be deemed negligent in failing to see the track, is undoubtedly true. Is this such a case? We are referred to *Allyn v. Boston and Albany Railroad Company* as an authority in favor of the proposition that it is. In that case, the plaintiff and a companion were riding, in the daytime, in an open wagon at the time of the acci-

dent. The highway over which they had driven ran for a mile or more nearly parallel with the railroad, which for most of the distance was plainly visible from it. As the crossing was approached, the highway bent a little, and in order to cross the railroad, rose four and a half feet. The ascent commenced twenty feet from the railroad track, and the track and the usual sign over the railway were visible for five rods or more before the railroad was reached. According to the plaintiff's own testimony, he could look up the railroad track towards the west (the direction from which the train which caused the injury came), and there was nothing to intercept the view. As they approached the rise, their horse was going at a moderate trot, and when they ascended the rise he walked. Plaintiff did not see where they were until the horse had got on to the track. He did not look up. Upon that state of facts the court held, that the jury should have been instructed that the plaintiff could not recover, and said: "There is nothing in the evidence to show any excuse for the neglect to ascertain whether a train was approaching. The fact that the plaintiff did not know that there was a railroad there is no admissible excuse, because it is obvious that any man who had his sight and used it, must have seen that he was approaching a railroad crossing. If the plaintiff did not see it, it shows conclusively that he was not using the circumspection and care which every prudent man does, and is required to use in traveling. It is absurd to suppose that a traveler, using ordinary care, could, in the daytime, and with nothing to interfere with his vision, get upon this railroad crossing without seeing it." (105 Mass. 77.)

It should be remarked that Massachusetts is one of the few states which hold that the burden of proof is upon the plaintiff to show ordinary care and caution on his part, as well as negligence upon the part of the defendant. But aside from that fact, there are marked differences between the facts of that case and this. There, the plaintiff had driven a mile or more nearly parallel with, and in plain sight of, the railroad. Alongside the track there was the usual sign over the highway, which was visible for five rods or

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more before the railroad was reached. There was nothing to intercept plaintiff's view if he looked up the track in the direction from which the train came. Here, it is not claimed that respondent ought to have seen more than eighty yards of the track, and that only while he was traveling on a trot, eighty or ninety feet. If his horses were traveling four miles an hour, he was little, if any, more than fifteen seconds in sight of the track before the accident occurred. Besides, witness Rock stated that the eighty yards of track in sight were built upon an embankment of an average height of from three to five feet. The road leading to the crossing is slightly up hill. Under such circumstances the track proper might not have been plainly in sight, even for the whole length of time above stated. Again, Rock testified that the wagon road from the east was "nearly at a right angle" with the railroad, but it does not appear how nearly. The map used on the trial is not before us, and the expression of the witness is indefinite. So far as we know, it departed so much from a right angle, that respondent would have been compelled to turn his head in order to see the track that was visible. In *Richardson v. New York Central Railroad Company*, 45 N. Y. 850, it is said: "The defendant, again, by its own act, caused this injury, in its erection of the watch-house, now not used, but preventing the traveler from seeing the train, which he otherwise might. That it obstructed this traveler's view is found by the referee. That it caused the injury may be fairly inferred, as nothing could be seen as he approached the track 'owing to the formation of the ground and the situation of the watch-house.' There was a map at the trial in evidence, and none is produced here. Presumptions are in favor of affirming a judgment. Error is not presumed. If there were doubts on this point, in the absence of the map, the presumption is against error." Respondent had a right to travel on that road and to trot his horses at a reasonable rate of speed; and as a stranger, he was justified in acting upon the presumption that if there was a railroad in the vicinity, the bell would be rung for a distance of a quarter of a mile before any railroad crossing. He was not

obliged to be looking out for railroad tracks simply because there happened to be one there; but he was obliged to see it, and seeing it, to act accordingly, if a man of ordinary care and watchfulness in like situation would have seen it, or ought to have seen it, in season to avoid the accident.

Allyn v. Boston & Albany Railroad Company, *supra*, is the only case to which our attention has been called, or which we have been able to find, wherein the effect of ignorance of the existence of a railroad by the injured party has been discussed. But there are many cases which recognize the plaintiff's knowledge of the location of the road, or of defects in a highway, as an important fact to be considered.

"The mere fact that a traveler is familiar with the road, and knows of the existence of a defect therein, will not impose upon him the duty to use more than ordinary care in avoiding it. Such knowledge is a circumstance, and perhaps a strong circumstance; but it should be submitted, with the other facts of the case, to the jury, for them to determine whether, with such knowledge, the plaintiff exercised ordinary care to avoid injury." (Shearman and Redfield on Neg., sec. 414.)

In *Smith v. City of Lowell*, 6 Allen, 40, the court instructed the jury that the care required of travelers must be such as ordinary persons, in the ordinary exercise of their faculties, are accustomed to use, and must be adapted to the particular circumstances of each case; that the jury, and not the court, must determine what circumstances were proven, and must also determine, in the exercise of their practical judgment, what degree of care was made reasonable by these circumstances; that if the plaintiff was accustomed to pass over the place in question, and was well acquainted with it, they should take these facts into consideration, and determine whether, on account of them, she ought to have used increased care, or to have avoided the place altogether. The supreme court sustained the instructions fully and said: "These things were rightly left to the jury, with the instruction that the care required in the plaintiff was such as the condition of the street and her knowledge of it made reasonable care under the circumstances."

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And see further: *Smith and wife v. The City of St. Joseph*, 45 Mo. 449; *Frost v. Inhabitants of Waltham*, 12 Allen, 85; *Clark v. The City of Lockport*, 49 Barb. 580; *Read v. Northfield*, 13 Pick. 98; *Mackey v. New York Central Railroad Company*, 27 Barb. 533, *et seq.*; *Dickens v. New York Central Railroad Company*, 1 Keys, 27; *Sheffield v. Rochester and Syracuse Railroad Company*, 21 Barb. 342; *Gilman v. Inhabitants of Deerfield*, 15 Gray, 581; *Flemming v. W. P. R. R. Co.* 49 Cal. 257; *Snow v. Housatonic Railroad Company*, 8 Allen, 450.

There may be a defect in a public road, and if a traveler knows of its existence, he must use ordinary care to avoid it, although it is invisible. Such defect may be readily seen by one having knowledge of its whereabouts, when an ordinarily careful man, if a stranger, might not see it in season to avoid an accident. No traveler sees every object in plain view the first time he passes through a strange country. Under the circumstances of this case, we think the fact that respondent and his companions were strangers in Eureka, and did not know they were approaching a railroad crossing, was an important fact to be considered, with others, by the jury, under proper instructions; and, we can not say, as a question of law, that respondent was guilty of contributory negligence, which should bar his right of recovery for any injury occasioned by appellant's negligence.

Exceptions to the charge to the jury remain to be considered. We have carefully examined all the instructions, and are satisfied that, with the exception of the third, given for respondent, they correctly state the law, unless it be true that appellant's eighth instruction is too favorable to it. But upon the latter question we express no opinion at this time. The fifth, requested by appellant, was properly refused, for the reason given by the court; the fourth and fifth, given for respondent, were correct, and the second, twelfth, fourteenth and fifteenth, given for appellant, were correct as modified and given. Without the modifications made the jury would have been told that it was respondent's duty to see the track itself, and to look both ways and listen for any train, although neither himself nor his driver

knew they were approaching a railroad track, or, as ordinarily careful travelers, ought to have known it or seen the track. Such is not the law. Certainly, appellant can not complain because the court informed the jury that it was negligent if it failed to ring the bell or blow the whistle, or otherwise signal the approach of the train. The test of negligence adopted by the court was more favorable to appellant than it would have been had it been limited to a failure to comply with the statute by ringing the bell.

The third instruction given for respondent is as follows: "You are instructed that where a railroad is crossed by any street, road, or public highway, the rights of the traveling public and the railroad company to the use of said crossing are equal, and both parties are bound to use ordinary care, the one to avoid committing, and the other to avoid receiving, an injury. For this purpose, it is the duty of the employes of the company to give sufficient signal of the approach of the train, by ringing the bell, sounding the whistle, or otherwise, *and to approach the crossing at such rate of speed as will enable them to check the train if necessary; and if you find from the evidence in this case that the defendant failed to exercise the degree of caution as above specified, and an accident occurred, by which plaintiff was injured, you will find a verdict for plaintiff, provided the plaintiff was free himself from negligence.*"

The italics are ours.

The first objection made to this instruction is, that it was error to charge that the rights of the traveling public and the railroad company to the use of the crossing were equal.

The case shows that the crossing was put in about three years before the trial, by Mr. Shaw, President of the Eureka Consolidated Mining Company, which built and then owned the road, for the private use of N. A. Chandler. Afterwards it became a public crossing, and was generally used by the public. In fact, Mr. Shaw changed the road leading through Clark street to that point, because the latter was more convenient as a crossing than where Clark street then intersected the railroad. There was no testimony on the part of the appellant tending to show that the crossing

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was used by the public without its consent, or that it ever forbade its general use. Under such circumstances, respondent was not a wrong-doer in passing or attempting to pass over the track. He had the same right to pass over the crossing that the railroad had to run its cars. (*Solen v. V. & T. R. R. Co.* 13 Nev.) Of course, in one sense, trains have the superior right of way in the use of public crossings; that is to say, travelers in other vehicles are bound to yield the way to the train, if one must stop, because it is but reasonable and just that the vehicle, which can halt with comparative ease and safety, shall do so. But in every other sense, the rights of appellant and respondent to the use of the crossing were equal.

It is also urged that the court erred in instructing the jury that the employes of appellant were bound to give sufficient signals of the approaching train by ringing the bell, etc., *and to approach the crossing at such rate of speed as would enable them to check the train, if necessary.*

We think the court erred in giving the last part in relation to the rate of speed when approaching the crossing, and that there is nothing in other portions of the instructions to correct the error or mitigate the evil. The instruction informed the jury that appellant was negligent if it failed to ring the bell, etc., and to approach the crossing, as stated. In other words, they were told that, even though the bell was rung, or other signal given, still appellant was guilty of negligence, if its train did not approach the crossing at such rate of speed that it could be checked if necessary. They were told that if appellant failed to exercise the degree of caution specified; that is to say, if it failed to approach the crossing as stated, and also to ring the bell, or give other signal, then their verdict must be for the respondent, provided the latter was free himself from negligence.

The jury were justified in understanding from the instruction (if respondent was free from negligence) that appellant was negligent, and responsible for all damages sustained by respondent, if the train did not approach the crossing at such a rate of speed that it might be so checked

that respondent would receive no injury, even though, in fact, the bell was rung or other sufficient signal given. The jury may have found the appellant negligent under the instruction in question, because the train could not be checked before the accident, rather than because the bell was not rung. We can not tell. Should this instruction be upheld, it would overturn every principle which has hitherto guided courts in determining the liability of railroad companies in similar cases, and would seriously impair the usefulness of their service. Let us see. There was no proof that the crossing was in any respect a crowded thoroughfare. It does not appear that any vehicle, other than respondent's, was there, or that any other person was crossing, at the time of the accident. It is not shown that at any time it had been often frequented by man or beast, but if anything is shown, the contrary appears. Now, suppose respondent had known of the railroad, and in approaching, had both looked and listened; had taken all necessary precaution before attempting to cross. He would then have been free from negligence in crossing, if he neither saw nor heard signs of the approaching train. Suppose, again, that the engineer did, in fact, ring the bell for eighty rods before reaching the crossing, and did not run his train faster than the usual rate of speed (which was reasonable), can it be said, if he was not otherwise negligent, that appellant would have been responsible in damages for an injury, simply because the speed of the train, although usual and reasonable, was too great to permit of a check sufficiently sudden to avoid an accident? And yet that is just what the instruction means. It required of appellant extraordinary, rather than ordinary, care.

There was no proof at the trial, and it is not pretended in the argument, that the train was going at an unusual or improper rate of speed. Such being the case, if the bell was rung, there was no occasion for directing the minds of the jury to the rate of speed; and there could have been no object in so doing, unless it was to inform them that appellant was negligent if it failed either to ring the bell, etc., or to approach the crossing at such a rate of speed

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that the train could be checked if necessary. There was no necessity of checking the train except to avoid the accident. It therefore follows, as before stated, that the jury were instructed that appellant was negligent if it approached the crossing at such speed that the train could not be checked in season to avoid the accident, although, in fact, the bell was rung according to law, and the speed was usual and reasonable. Such is not the law in a case like this.

It is said that "both parties are equally bound to use ordinary care—the one to avoid committing and the other to avoid receiving injury. For this purpose, it is the duty of the engineer to keep watch for travelers, to give sufficient signals of the approach of the train, by ringing his bell, sounding the whistle, or otherwise, as may be usual, and also to approach a crossing which he knows to be continually thronged with travelers, and unprotected by the company, at such rate of speed as will enable him to check the train, if necessary." (Shearman and Redfield on Negligence, sec. 481, third ed.)

The authority for the text just quoted is the *Lafayette and Indianapolis Railroad Company v. Adams*, 26 Ind. 76. In that case, however, the defendant's road ran through a populous street, and the track was commonly used by the inhabitants as a foot-way. The rate of speed was so great as to show that those managing the train had no care whatever as to who or how many might be killed or injured. "The case," says the court, "was so put to the jury by the instructions of the court that, upon the evidence, the verdict must have been for the defendant, unless the fact of gross negligence by the defendant, evincing a willingness to injure, had been found."

So it is apparent that neither the text nor the case cited upholds the instruction in this case; because here, as before stated, there was no proof that the crossing was, or ever had been, thronged with travelers, but the contrary, rather, appears. But in the same section of Shearman and Redfield referred to, the authors say: "But an engineer is not bound to lower his speed on approaching the ordinary high-way crossings in the open country, where travelers only pass

Points decided.

occasionally. And even if he sees persons or teams approaching or waiting to cross the railroad, he is not bound to anticipate that they will attempt to cross in view of the train; and, therefore, he is not required to check his speed so much as would be necessary to enable them to cross in front of him."

See, also, *Warner v. N. Y. Cent. R. Co.*, 44 N. Y. 465; *Telfer v. Northern R. Co.*, 30 N. J. Law. 188; *The Madison and Indianapolis R. Co. v. Taffe*, 37 Ind. 365. Without quoting we make particular reference to *Telfer v. Northern R. Co.*, *supra*.

We are not unmindful of the fact, that the train in this case was passing through a cut as it approached the crossing, and that respondent's view of the train was obstructed. But he testified that he should have heard the bell if it had been rung; so for the purposes of this discussion, the fact above mentioned becomes immaterial. If the bell could have been heard and was rung according to law, appellant was not negligent in approaching the crossing at its usual rate of speed. If it was not rung, the negligence was in failing to sound the bell, and not in approaching the crossing at such a rate of speed that the train could not be checked before the accident.

For the error found in the third instruction given for respondent, the judgment should be reversed, and it is so ordered.

[No. 938.]

JAMES FINLAYSON, APPELLANT, v. WILLIAM A. MONTGOMERY, RESPONDENT.

APPEAL MUST BE PROSECUTED—FAILURE TO FILE BRIEFS.—If appellant's counsel fail to appear and orally argue the case when set for trial, and also fail to file any brief within the time allowed by the court, the judgment will be affirmed without any examination of the record on appeal.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The facts appear in the opinion.

14	397
17	141
30*	606
17	242
30*	882
20	88
16*	434

Points decided.

Wren and Thornton, for Appellant.

A. M. Hillhouse, for Respondent.

By the Court, LEONARD, J.:

On the eighteenth day of November, 1878, this case was set down for argument. No oral argument was had, but a stipulation was filed by the parties, agreeing to submit the case upon briefs to be filed. Appellant was given until December 1st, and respondent ten days thereafter.

Subsequently other stipulations of counsel were filed, extending the time for filing briefs. On the 3d day of the present month, counsel for appellant, when in court, were granted ten days further time. That time has expired, and still appellant has filed no brief.

Under such circumstances we do not consider it our duty to look into the record. The judgment of the court below is affirmed for appellant's failure to prosecute the appeal. (*Fulton v. Day*, 8 Nevada, 82.)

14	398
15	100
17	110
28*	125

[No. 950.]

ANGUS MCLEOD, RESPONDENT, v. W. R. LEE ET AL.,
APPELLANTS.

ORDER GRANTING NEW TRIAL.—WHEN IT WILL BE SUSTAINED.—Where, on appeal from an order granting a new trial, the record shows that the motion was made upon two grounds, without showing upon which of them the action was based, the order will be affirmed, if the action of the court can be sustained upon either ground.

IDEM—CONFLICT OF EVIDENCE.—If a new trial is granted upon the ground that the evidence is insufficient to sustain the verdict, the action of the court will be sustained by the appellate court, if there is a substantial conflict in the evidence.

APPEAL from the District Court of the Eighth Judicial District, Esmeralda County.

A. W. Crocker and Robert M. Clarke, for Appellants.

M. A. Murphy, for Respondent.

By the Court, LEONARD, J.:

Respondent brought this action to recover damages alleged to have been sustained by him by reason of an overflow of the waters of Walker river, caused, as is claimed, by the erection and maintainance by appellants of a dam across said river; also, to enjoin appellants from diverting any of the waters of Walker river at any point above the lands of respondent, described in the complaint, and particularly from a certain point and place mentioned and described therein; also, that appellants be commanded and required to remove from across the natural channel of said river the dam constructed by them, and that such requirement be embodied in the final judgment.

Appellants, in their answer, denied all the material allegations contained in the complaint, and alleged that "they constructed the dam and ditch described in plaintiff's complaint, under the provisions of a contract of permission from plaintiff, the conditions of which have all been fulfilled on the part of these defendants, and that they have in no wise exceeded their rights under said contract of permission."

The cause was tried by the court without a jury, and the facts found were wholly in favor of appellants.

Respondent moved for a new trial on the ground that the evidence was insufficient to justify the findings and judgment of the court, and the further ground of newly-discovered evidence. The court ordered a new trial without specifying the ground upon which the order was made, and this appeal is taken from that order.

It is urged by counsel for appellant, that the evidence overwhelmingly supports the findings; that the findings support the judgment, and that the judgment is in accordance with law; that it is reasonable to presume, under the circumstances, that the affidavits in support of the motion for a new trial, setting out what is claimed to be newly-discovered evidence, induced the court to order a new trial; that if those affidavits are eliminated from the record, no legal grounds exist for the order granting a new trial; that the

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so-called newly-discovered evidence is cumulative, immaterial, irrelevant, and inconsistent with respondent's testimony given upon the trial, and that, therefore, unless it can be shown that the court erred in the first instance, its judgment must be upheld and the order reversed.

Under the circumstances, we do not deem it necessary to decide whether or not the affidavits are obnoxious to the criticism of counsel for appellant. We think the rule which should govern appellate courts in cases like this is correctly stated in *Lawrence v. Burnham*, 4 Nevada, 365. In that case, as in this, the action was tried by the court without a jury; the findings were in favor of the appellant, and judgment was rendered for him. A motion for a new trial was subsequently made and granted. It did not appear upon what ground the motion was granted.

The court said: "When a verdict and judgment are in accordance with the evidence, and there is no substantial conflict in it, upon any material issue, and no error has intervened, the lower court has no right to disturb such verdict and judgment. If there be a conflict in the evidence upon some material issue, or if any substantial error is shown to have been committed, the appellate court will not disturb the order of the court below if it set aside the verdict and judgment; but when nothing of the kind appears in the record to warrant such order, its order will be set aside as unauthorized." In *Oullahan v. Starbuck*, 21 Cal. 414, defendant recovered judgment. Plaintiff moved for a new trial upon several grounds, one of which was, "insufficiency of the evidence to justify the verdict." The court granted the motion without indicating the ground upon which it acted. Defendant appealed from the order, and the court said: "It is stated by the appellant's counsel that the only ground upon which the court below based its action in granting the new trial, was a supposed error in its refusing to allow a peremptory challenge to a juror after he had been accepted, though not sworn. We do not doubt that such was the fact, but the record does not show this, and by its contents we must be governed. The record shows that the motion was made on the further

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ground that the evidence was insufficient to justify the verdict, and does not indicate upon which of the two grounds the court based its ruling. There was conflicting evidence on the trial, though the evidence which is stated in the record appears to fully support the verdict. It is not enough, however, to authorize any interference with the action of the court below—either in granting or refusing a new trial for alleged insufficiency of the evidence—that an appellate court, judging from the evidence as it is reduced to writing, would have come to a different conclusion.”

It is said by counsel for appellant that the findings of a court are as conclusive as the verdict of a jury. We so understand the law. (*State v. The Yellow Jacket S. M. Co.* 5 Nev. 421.) The same weight and consideration are always to be given to such findings as to a verdict.

But we understand, also, that a court has the same right to grant a new trial, if upon more mature deliberation it concludes that a material finding is not supported by the evidence, as it has to set aside the verdict of a jury for the same reason; and the same rule obtains in the appellate court in both cases, as to the effect of conflicting evidence upon material issues.

Conceding it to be true, for the purposes of this appeal, that in 1873, prior to the building of the mill in question, and before the digging of the ditch or the erection of the dam, respondent gave Lee general permission and license to build the mill where it now stands, and to take water, as is stated in the first finding of fact; also that a parol license was given to all the appellants to dig the ditch and to erect a dam where they now are; and that such license to the extent then given is irrevocable after execution, under the doctrine stated in *Lee v. McLeod*, 12 Nev. 280; still, there was another most material issue in the case, wherein the court found for appellants, and upon which the evidence was extremely conflicting. It was not claimed by either of the appellants—and they were all witnesses—that they ever had permission to erect a permanent dam over eighteen inches or two feet in height. They did testify that they had leave to build a temporary or false dam upon the perma-

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nent one, during low water, but they admitted that they were to remove the latter before high water, and claimed to have done so at the time of the overflow, in June and July, 1876, when the damage in question was done. It was in proof that the effect of a dam in Walker river is to cause the deposition of sand and sediment in the river bed until the deposit is raised as high as the dam itself; that, in this case, the sand deposited caused the water to spread out and overflow the banks, and run upon respondent's ranch and crops.

Under such circumstances, it of course became material to ascertain whether or not appellants had performed their agreement in relation to the license claimed, to erect false dams, and in consideration of which such license was given; and in determining that fact nothing was more important than to find whether, at the time of the overflow, the dam was higher than eighteen inches or two feet, and, if it was, whether such additional height caused the whole or any part of the damage sustained.

The court found that appellants had permission to build a permanent dam eighteen inches high, and that, afterwards, they had permission to temporarily raise said dam by means of brush and temporary additions to the extent that, at low stages of the water, it might still remain at the original height, to wit, eighteen inches higher than the bottom of the aperture of the head-gate of their ditch, but that it was agreed that the temporary additions made during low-water seasons should be removed before the high-water season. The court found, further, that at the time of the overflow the dam was no higher than it was at the time of its original construction. Upon the last fact seven witnesses testified positively for respondent and against the finding, while three testified for appellants and in support of the finding.

McLeod testified that on the first of June, 1876, the dam raised the water five feet; that it was of that height during the freshet on the fourth of July, 1876, the time the damage in question was done; that it was solid from bank to bank—not a break in it; that in the spring of 1875, when appellants started to raise their dam, he told them they must not raise it, as it would damage and ruin his ranch;

that he always objected to raising the dam above eighteen inches high, and that was to be temporary.

Garrard, a surveyor, testified that he made a survey of the dam on the twelfth of September, 1876; that at that time the east end of the dam was washed away and all the water was running through the break; that the dam was higher than McLeod's meadows; that the bed of the stream had been filled up on a level with the top of the dam and ran up the stream to nothing; that it would have taken a four-foot dam above the surface of the water to force a head of water through the box and ditch, because of the presence of sand at the outlet of the box and elsewhere; that the dam caused the overflow.

Snyder testified that he was at respondent's ranch quite immediately after the flood; that he went to the dam and it was solid from one bank of the river to the other; that there was no break in it, and that it was five or six feet high.

Mickey said that on the twenty-eighth of August the dam was three feet above the water level, and that there was no break in it; that he had seen the dam five feet high or more.

Bennett said he saw the dam on the twentieth of August, and the water flowed over it from one bank to the other; that he saw it fifteen or twenty days after, when it was broken; that it was higher before the flood than it was on the twentieth of August, when he measured and found it three feet high above the water level.

Ross saw it on the second of July, when it was solid from bank to bank, and fully five feet high. He saw it again on the fifth of September, when it was solid, but in November he saw it broken.

Dunlap saw the dam in August, and said it was solid and fully five feet high.

Lee, one of the appellants, testified as follows: "McLeod never objected to the building of the dam until 1876. In the spring of 1876 he did object to the building of the dam and told us we must take the top off. Late in the season of 1874, when the river had fallen, and we were engaged in putting on a temporary addition of willows and stakes, in order to keep the water at its original height, he told us

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that we would have to take it off before the water raised or it would overflow his ranch. We assured him we would do so. He made no other complaint or suggestion until in the spring of 1876, when he told me that the water was raising and that I had better remove the top dam. I went up to the dam and removed it. A day or two after I learned it was partly replaced. I found willows tied upon stakes with wire, evidently placed there by Indians. I removed what I could, and the next day went up with help and a horse and removed the balance. This was early in the spring, long before the highest water in June and July. * * * At the time of the high water in the spring of 1876, the east end of the dam gave way. We built it up again. The west end did not float away. McLeod was growling about it, and we pulled some of the top off. McLeod saw the addition we had put to it and he said it was too high. We took off some of the top in March, 1876. McLeod said it was too high and would ruin his ranch, and we took off some in the middle. * * * I was up and down the ditch every day in July, 1876, and saw the water running over the whole length of the permanent dam, no false dam or brush on the top of it, and no drift-wood lodged against it. * * * We did not claim the right to the dam without McLeod's permission, and when he gave us permission we thought we had a right to build and maintain the dam. I do not acknowledge his right to require us to remove it now. In September or October, 1873, he (respondent) told me what he had told the Mills boys. The Mills boys told me that they had made arrangements with McLeod to build the ditch and put in an eighteen or twenty-inch dam. They also told me that they were to build the levees. * * * McLeod did say we might keep a dam in the river eighteen or twenty inches high; so the Mills boys told me." The appellants, Mills, when witnesses, did not claim that they had leave to put in a dam higher than eighteen inches or two feet. They testified that the one they put in raised the water eighteen inches, and that they never raised the permanent dam an inch; that they put in false dams in 1874, 1875 and 1876; that the last was taken off in March

Statement of Facts.

or April, 1876. James Mills said: "McLeod told us where and of what dimensions to build levees, and we built them to his complete satisfaction, and he so expressed himself. He at no time requested us to make others, or to do anything except remove the temporary dams during high water, and this we always have done." Jacob Mills testified substantially like his brother.

There was certainly a greater number of witnesses who testified against than in favor of the finding of the court in relation to the height and condition of the dam at the time of the overflow. We cannot know that the court did not grant a new trial under the conviction that it had erred in its conclusion upon this material issue.

The order of the court appealed from is affirmed.

14	405
15	316
15	320

[No. 947.]

**WILLIAM SOLEN, APPELLANT, v. VIRGINIA AND
TRUCKEE RAILROAD COMPANY, RESPONDENT.**

EXECUTION MUST FOLLOW JUDGMENT—INTEREST.—An execution must follow the judgment, and if the judgment does not call for interest, the execution can not. (*Hastings v. Johnson*, 1 Nev. 617, affirmed.)

APPEAL from the District Court of the First Judicial District, Storey County.

On the thirteenth day of December, 1876, William Solen, appellant, recovered judgment against the Virginia and Truckee Railroad Company, respondent, for the sum of fifteen thousand dollars, with costs, being the amount of damages assessed by a jury for personal injuries received by appellant. Respondent appealed to the supreme court, and on the twenty-first day of June, 1878, the judgment of the district court was affirmed. (13 Nev. 106.) The judgment so affirmed contained no direction as to interest.

On the twenty-ninth day of June, 1878, the respondent paid to the clerk of the district court the sum of fifteen thousand dollars, with the costs as docketed in the court below. The court thereupon ordered that execution be

Opinion of Leonard, J., concurring.

stayed on said judgment. On the sixth of July, 1878, appellant moved the district court to set aside its order of June 29th, and for an order directing the clerk to issue execution on the judgment, with interest thereon from the entry thereof, at the rate of ten per cent. per annum. The court made an order denying said motion. Appellant appeals from both of said orders.

C. H. Belknap and Kirkpatrick & Stephens, for Appellant.

I. The judgment bears interest from its date at the rate of ten per cent. per annum. (Stat. 1861, p. 99, sec. 4 (1 Comp. Laws 32); *Burke v. Caruthers*, 31 Cal. 467; *Randolph v. Bayue*, 44 Id. 366; *Atherton v. Fowler*, 46 Id. 320; *Clark v. Dunnam*, Id. 204; *Dougherty v. Miller*, 38 Id. 548; *Bell v. Knowles*, 45 Id. 193; 5 Dana, 466; 6 B. Mon. 197; *Berryhill v. Wells*, 5 Bin. 56.)

Whitman & Wood, for Respondent.

I. The judgment was satisfied by the payment of money into court.

II. Execution must follow the judgment. (*Hastings v. Johnson*, 1 Nev. 613.)

By the Court, HAWLEY, J.:

The decision in *Hastings v. Johnson*, 1 Nev. 617, is directly in point, and adverse to the views contended for by appellant, upon the real question presented by this appeal.

It was therein decided that where the judgment of the court is silent as regards the collection of interest, it does not authorize the issuance of an execution calling for payment of interest on the judgment; that the execution must follow the judgment, and if the judgment does not call for interest, the execution can not.

Upon the authority of that case, I think the orders appealed from ought to be sustained. It is so ordered.

LEONARD, J., concurring:

I concur in this opinion solely upon the ground stated by the court, that we are bound by the decision in *Hastings v.*

Points decided.

Johnson. If the question decided by the majority of the court in that case was now presented for the first time, I could not agree with the conclusion arrived at. But the record in that case fairly presented the question decided by the majority, as well as the one upon which all agreed. Such being the case, the decision cannot be regarded as *obiter* (*Starr v. Stark*, 2 Sawyer, 605); and under the doctrine of *stare decisis* should be adhered to.

[No. 989.]

THE STATE OF NEVADA, RESPONDENT, v. JOHN DAVIS, APPELLANT.

14	407
17	288
30*	896
17	443
30*	1086

14	407
25	471

COMPETENCY OF JUROR—EXHIBITION OF NEWSPAPER ARTICLE—REFRESHING

MEMORY.—A juror testified that he had read in the Carson *Appeal* what purported to be a true account of the difficulty. Defendant's attorney asked him whether, if his memory was refreshed by "an exhibition of a newspaper article purporting to give an account of the transaction in question, he could answer whether he had formed an unqualified opinion, touching the matter in issue." *Held*, that this question was properly excluded, because it was not limited to the particular article the juror had read.

PRELIMINARY EXAMINATION—WAIVER OF STATUTORY RIGHT.—Defendant

objected to proceeding with the trial because the testimony given at his preliminary examination had not been reduced to writing, as required by the statute. *Held*, that he could not avail himself of this irregularity without an affirmative showing that he was deprived of this statutory right without his consent.

IDEM—CONTINUANCE.—Some of the witnesses who testified at the preliminary examination were absent from the state. There was no showing made that their testimony was material, or that any effort had been made to procure their attendance. *Held*, that the court did not err in proceeding with the trial.

ASSAULT WITH DEADLY WEAPON—INTENT.—It is the character of a weapon and the manner in which it is used (not the purpose for which it is carried), taken in connection with the facts and circumstances of the assault, that indicate the intention of the defendant.

IDEM—DEADLY WEAPON—QUESTION OF FACT.—Where the character of the weapon, whether deadly or not, is doubtful, or where its character depends upon the particular manner in which it was used, the question is one of fact and should be submitted to the jury.

INSTRUCTIONS—RIGHT OF COURT TO MODIFY.—A court is not bound to give instructions in the exact language asked for by counsel; but may add to,

Statement of Facts.

or change, the phraseology in order to make them clear and explicit, or to prevent the jury from being misled.

IDEM—WHEN SHOULD BE EXPLICIT.—If a defendant desires explicit instructions to be given upon any point, it is his right and duty to prepare the same and ask the court to give them.

APPEAL from the District Court of the Second Judicial District, Ormsby county.

The instructions complained of by appellant, and referred to in the opinion of the court, are as follows:

Instruction given by the court of its own motion: "A reasonable doubt, in the law, is one founded upon a full and fair consideration of all the evidence in the cause and circumstances surrounding the transaction, shown and adduced by either the state or defendant, or both, and is not a doubt resting upon mere conjecture or speculation. The law presumes the defendant innocent of the crime alleged, and, to entitle you to find the defendant guilty of any offense, his guilt of such offense must be found by you from all the evidence adduced beyond a reasonable doubt, as above defined; and, if you have any such reasonable doubt, the defendant is entitled to the benefit thereof, and you must acquit."

Instruction number five, asked by the prosecution and given by the court: "The jury are further instructed that if they find, from the evidence, that on or about the nineteenth day of December, 1878, in this Ormsby county, Nevada, the defendant, John Davis, did, without provocation or excuse, assault one Albert Standinger, and did beat him with a weapon, instrument, or other thing, and that such weapon, instrument, or other thing was not of a deadly character, then the jury should find the defendant guilty of assault and battery."

Instruction No. 1 asked by defendant: "If the jury believe from the evidence that defendant assaulted Albert Standinger, at the time and place mentioned in the indictment, with a club or spoke of a wheel, without any sufficient provocation for such assault having been previously given by said Standinger to said defendant for such conduct on

Argument for Appellant.

defendant's part; and if the jury believe that defendant then and there inflicted a serious wound upon the forehead of said Standinger, but that there was no intention on defendant's part to kill said Standinger, but only to inflict a blow, or at most a bodily injury upon Standinger, the defendant can not be found guilty of the offense specified in the indictment."

The court modified this instruction by adding thereto, as follows: "But may find the defendant guilty of an assault and battery, or of an assault with a deadly weapon, with intent to inflict upon the person of another a bodily injury; *provided*, that in the latter case you first find that the weapon, instrument or thing, if any, used by Davis, was a deadly weapon, instrument, or thing."

N. Soederberg, for Appellant.

I. The court erred in refusing to allow defendant to refresh the memory of the juror Laforge. The fact to be established was whether or not this juror had formed an unqualified opinion of the matter in issue. It was immaterial how the fact was established, whether by the juror himself or by other proof, and it was equally immaterial by what means the juror was enabled to give the desired information. (2 Phillips on Ev., Cow. & Hill., and Edw.'s Notes, 773 (top p. last par.), 774, 750, 760.)

II. It was error to reject defendant's evidence of hostile relations between himself and the witness McArthur. The intention with which defendant carried the club at the time of the difficulty, was the most important question in the case.

III. The court erred in leaving the question to the jury whether the club was a deadly weapon. (10 Nev. 284; Bish. Cr. L. 335.)

IV. The instruction upon the question of reasonable doubt was erroneous and calculated to mislead the jury to the prejudice of defendant. It authorized defendant's conviction upon a mere preponderance of evidence.

V. Defendant's instruction No. 1 should have been given

Opinion of the Court—Hawley, J.

in its original form, without modification. (*State v. Ferguson*, 9 Nev. 106.)

VI. Plaintiff's instruction No. 5 does not correctly state the law. The character and severity of the blow, and not the kind or character of weapon used, determines the grade of the offense.

VII. The court erred in compelling defendant to proceed to trial, the testimony taken on the preliminary hearing not having been reduced to writing, and several material witnesses being absent from the state at the time of the trial.

M. A. Murphy, Attorney-General, for the Respondent.

I. Defendant's attorney did not offer to produce the paper containing the article the juror had read. The question asked the juror was improper. (*Morgan v. State*, 31 Ind. 196; *Clem v. State*, 33 Id. 425.) A mere impression or suspicion derived from reading a newspaper article, does not disqualify. (*Fahnestock v. State*, 23 Ind. 235; *People v. Mahoney*, 18 Cal. 180-183; *People v. Symonds*, 22 Id. 351; Cent. Law Journal, Aug. 29, 1879, p. 1.)

II. The evidence of the difficulty between defendant and McArthur was properly excluded. If A arms himself, intending to murder B, shoots C, supposing C to be B, and wounds C, he is guilty for an assault with intent to murder C. (*People v. Torres*, 38 Cal. 143.)

III. The instruction upon reasonable doubt was correct. (*U. S. v. Knowles*, 4 Saw. 521; *U. S. v. Foulke*, 6 McL. 355; *Long v. The State*, 38 Ga. 508; *Commonwealth v. Drum*, 58 Pa. 22.)

By the Court, HAWLEY, J.:

Defendant was indicted and tried for the crime of an assault with intent to kill. The jury found him guilty of "an assault with a deadly weapon, with intent to commit a bodily injury upon the person of Albert Standinger."

1. One Laforge, upon being examined by defendant's counsel touching his qualifications as a juror, testified that he had read in the *Carson Appeal* what purported to be a detailed account of the alleged commission of the crime

charged against defendant; that he had forgotten whether, from the reading of said account, or from any other information, he had formed or expressed an unqualified opinion as to the guilt or innocence of the defendant; but that it was possible, if he was taken as a juror, when the testimony was delivered, whatever opinion (if any) he might have formed, might be revived in his mind. Counsel for defendant then asked said juror, "Whether or not, if his memory was refreshed by an exhibition of a newspaper article purporting to give an account of the transaction in question, he could answer whether he had formed an unqualified opinion touching the matter in issue?"

Did the court err in excluding this question? Certainly not.

If for no other reason, it was properly excluded because counsel did not limit the question to the particular article the juror had read in the *Carson Appeal*, but referred generally to any "newspaper article purporting to give an account of the transaction."

2. Defendant objected to proceeding with the trial, on the ground that the testimony taken on the preliminary examination of defendant had not been reduced to writing, and also on the ground that several of the witnesses who testified upon the hearing were absent from the state, and were not present at the trial; that the testimony of said witnesses was material to the defense; that in the absence of the written testimony defendant's present attorney and defendant himself were unable to properly cross-examine the witnesses for the state who were present at the trial.

It was admitted by counsel for the state that the testimony at the preliminary examination had not been reduced to writing, and that some of the witnesses who testified before the magistrate were absent from the state.

In our opinion, the court did not err in proceeding with the trial. Upon this point—as well as the preceding one—the defendant failed to lay the proper foundation to have the question considered on its merits.

In justice to the state as well as the defendant, the testimony given at the preliminary examination ought

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always to be reduced to writing and authenticated as provided in section 151 of the criminal practice act (1 C. L. 1779). If the defendant waives this right, the state ought to insist upon it. The practice of waiving preliminary examinations, or dispensing with any of the statutory requirements in regard thereto, is irregular and ought to be discontinued. (*Ex parte Ah Bau*, 10 Nev. 265.) It is questionable whether the defendant could avail himself of this irregularity, if at all, except upon a writ of *habeas corpus*, on the ground that he was illegally restrained of his liberty. But in no event could he, at any time, avail himself of such an irregularity, without an affirmative showing that he was deprived of the statutory right without his consent. No such showing was made in this case. So with reference to the absent witnesses. There was no affidavit presented to show that their testimony was material or that any effort whatever had been made to procure their attendance.

3. The club or wagon spoke with which the alleged offense was committed was introduced in evidence without objection. The defendant testified in his own behalf that he struck Standinger with the club; that he was intoxicated and excited at the time of the difficulty, which occurred at a gambling table; that Standinger said something to defendant which displeased him; that bitter words ensued; that Standinger arose in his chair and defendant struck him in the forehead with the club once and then walked away. The testimony for the prosecution tended to show that the blow was struck by the defendant without any provocation; that defendant came up behind Standinger, and upon his turning around towards defendant the blow was inflicted. The defendant claimed that he did not carry said club for the purpose of striking Standinger, but that he carried it as a means of self-protection against one McArthur, with whom he had a difficulty shortly before, and that McArthur had made threats against him of personal violence. Counsel claim that defendant was not guilty of any offense except that of assault and battery. Upon this state of the case, counsel for the defendant asked the witness McArthur:

“What were your relations with the defendant, and was there any difficulty between you and defendant on and previous to December 19, 1878?”

This question the court refused to allow the witness to answer. We think this action of the court was correct. The proposed testimony was wholly irrelevant. It did not tend to show the intent with which defendant struck the blow. Under the facts of this case it was immaterial for what purpose defendant carried the club. He may have procured and carried it for the purpose of protecting himself against McArthur, but that fact would not relieve him from any responsibility for his acts if he assaulted and struck Standinger without any lawful excuse or provocation. It was the character of the weapon and the manner in which it was used (not the purpose for which it was carried), taken in connection with the facts and circumstances of the assault, that indicated the intention of the defendant.

4. The court did not err in leaving the question to the jury whether the club used by defendant was a deadly weapon.

It was peculiarly within the province of the jury, under the facts of this case, to determine, as a fact, whether the club in defendant's hand, as it was used by him, was likely to produce fatal consequences or not. The law is well settled that when it is practicable for the court to declare whether a particular weapon is deadly or not, the question “is one of law for the court, and not of fact for the jury” (1 Bish. Cr. L., sec. 335, 3d ed.), but in all cases where the character of the weapon in this respect is doubtful, or where the question depends upon the particular manner in which it was used, the question should be submitted to the jury. (*State v. Rigg*, 10 Nev. 290; *State v. Jarrott*, 1 Ire. (L.) 87; *U. S. v. Small*, 2 Curtis, C. C. 243; *Rex v. Grice*, 7 C. & P. 803.)

5. The several objections urged against the instructions are not well taken.

The court is not bound to give instructions in the exact language used by counsel, even if correct; but may add to, or change, the phraseology in order to make the language

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more clear and explicit, or to prevent the jury from being misled.

If the defendant had desired a more explicit instruction relative to reasonable doubt, it was his right and duty to have prepared such an instruction and asked the court to give it. (*State v. Smith*, 10 Nev. 106; *Gaudette v. Travis*, 11 Id. 149; *Solen v. V. & T. R. R. Co.*, 13 Id. 153.)

Without further noticing the objections, it is sufficient to say that all the instructions as modified and given by the court are substantially correct, and that no error prejudicial to defendant appears therein.

The judgment of the district court is affirmed.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF NEVADA.
JANUARY TERM, 1880.

[No. 991.]

R. A. BERRYMAN, ASSIGNEE IN INSOLVENCY OF G.
W. MATTHEWS, APPELLANT, *v.* LEOPOLD STERN,
RESPONDENT.

ATTACHMENT LIEN—INSOLVENT DEBTOR ACT.—Under the statute of this state the lien of an attaching creditor is preserved and may be enforced by judgment and execution, notwithstanding an order staying proceedings against the insolvent debtor made in pursuance of the act for the relief of insolvent debtors. (1 C. L. 434.)

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts appear in the opinion.

N. Soderberg, for Appellant.

I. In construing a statute every clause and provision shall avail and have the effect contemplated by the legislature. (*Peck v. Jenness*, 7 How. 623; *Knowles v. Yeates*, 31 Cal. 82; *Cullerton v. Mead*, 22 Cal. 95.)

II. Taking the various provisions of the act for relief of insolvent debtors, it is clear that no valid, personal judgment can be rendered against an insolvent after the surrender of his property.

Argument for Respondent.

III. The phrase "all legal mortgages and liens," in section 36, means all legal mortgages and similar liens. It does not mean liens of a different character. An attachment is not a lien. (Foster's case, 2 Story, 131; 3 Story, 428; *Fisher v. Vose*, 3 Robinson (La.) 457).

IV. The attachments were dissolved by the institution of proceedings in insolvency by Matthews and by the order of the district judge.

Upon the rendition of the judgments they became *functus officio*. The lien acquired by the levy of an execution is independent of all provisional remedies.

An attachment is a right created by statute in derogation of the common law, and is subject to strict rules of construction. The lien, at best, is nothing but security for the satisfaction of a future personal judgment. (*Meyers v. Mott*, 29 Cal. 365; Drake on Attachment, sec. 228.)

T. Coffin, for Respondent.

I. All liens are preserved in insolvency and may be enforced in the same manner as if no petition had been filed. (Comp. Laws, 461.)

II. An attachment duly levied becomes a lien upon the property attached, which nothing can divest, save the dissolution of the writ of attachment. (Drake on Attachment, sec. 224, and authorities there cited. Also, *Bagley v. Ward*, 37 Cal. 121.)

III. No act or proceeding in insolvency dissolves a writ of attachment. (Drake on Attachment (4 ed.), sec. 435; Drake on Attachment (5 ed.), 425, and authorities there cited.)

IV. The only way known to our practice of enforcing an attachment lien is to proceed through judgment, execution, levy, and sale. (Comp. Law, 1184, *et seq.*; Drake on Attachment, sec. 224a.)

V. In insolvency proceedings, where a lien is preserved, the ordinary means of enforcing it are also preserved. (*Kittridge v. Warren*, 14 N. H. 509; *Kittridge v. Emerson*, 15 Id. 227.)

Wells & Stewart, also for Respondent.

By the Court, BEATTY, C. J.:

The complaint in this action shows that on January 24, 1879, a number of suits had been commenced in a justice's court of Ormsby county against G. W. Matthews, and that attachments had been issued therein, and levied on his personal property; that in the first of said suits judgment had been entered in favor of the plaintiff for three hundred dollars, and costs and execution thereon issued, but not levied, when, on said day, Matthews having filed a petition in insolvency, the district judge of said county made an order staying all proceedings against him; notice of which order was served on the justice of the peace, and the defendant, who, as constable, had served the attachments under which the property of Matthews was held; that notwithstanding the order staying proceedings against Matthews, and notice thereof, judgments were entered, and executions issued in the pending suits, and that under said executions, and the one issued prior to the order staying proceedings, the defendant levied upon and sold all the attached property for about nine hundred dollars, and applied the proceeds to the satisfaction, first, of the judgment for three hundred dollars, above mentioned, and next, to the satisfaction of the several judgments entered after notice of the order staying proceedings, and before the appointment of plaintiff as assignee of the insolvent estate. Upon these facts, plaintiff, as representative of the creditors at large of Matthews, asks judgment against the defendant for nine hundred dollars, the value of the attached property.

To this complaint the defendant demurred, on the ground that it failed to state facts sufficient to constitute a cause of action. The district court sustained the demurrer, and, the plaintiff being unable to amend, defendant had judgment, from which plaintiff appeals.

The principal question raised by the demurrer, and the only question argued by counsel, is this: Has an attaching creditor a lien which is preserved and may be enforced, notwithstanding an order in insolvency, staying all proceedings

against his debtor, made before judgment in the attachment suit?

The answer to this question depends upon the proper construction of the following proviso at the end of section 36 of the Insolvent Debtor's Act (C. L. sec. 461): "*Provided*, all legal mortgages and liens *bona fide* existing on such property at the time of the surrender aforesaid, shall remain good and valid, and may be enforced in the same manner as though no such surrender had been made."

Counsel for appellant contends that the word "liens" in this proviso should not be held to include attachment liens, but only such (like mortgages) as are created by the act of the owner of the property, and to which the creditor has a vested right under his contract—that insolvency, like death, should dissolve an attachment and destroy the lien. We think, however, that counsel has, at most, succeeded in showing that such ought to be, not that it is, the law. The decisions construing similar provisos have been collected by Mr. Drake in his work on attachments, and they are overwhelmingly in favor of the construction which makes them include attachment liens. (Drake on Attachment, sections 224, 224a, 435, and cases cited. See, also, 14 Cal. 47, and 37 Id. 121.)

It has been held in California (29 Cal. 365-6), that the death of the defendant in an attachment suit before judgment, dissolves the attachment. But, although there is a striking analogy between the cases of death and insolvency of a debtor, and strong reasons why the claims of creditors against his estate should be settled on the same principles, still it is undeniable that the Probate Act contains nothing equivalent to the proviso above quoted, but, on the contrary, contains several provisions of opposite import.

We are satisfied that under our statute the lien of an attaching creditor is preserved and may be enforced by judgment and execution, notwithstanding an order staying proceedings against the debtor, made in pursuance of the insolvent debtor's act (C. L. sec. 434), and consequently that the demurrer in this case was properly sustained.

We are not to be understood, however, as deciding that

Points decided.

any of the judgments against Matthews are valid except that which was entered before the order staying proceedings was made. The complaint shows that that was a valid judgment, and that execution was issued thereon before the order to stay proceedings. That execution gave the defendant authority to sell the property, and he is entitled to retain any surplus of the proceeds after satisfying the first judgment until the other suits are decided. If, as appellant contends, the judgments in those other suits are void by reason of the fact that they were entered before his appointment as assignee, and without substituting him as defendant, the result would seem to be that they are still pending, and that he may go in and defend in behalf of the creditors of Matthews. If he is permitted to do so, and succeeds in defeating those attaching creditors, he will then be in a position to demand of the defendant the money which remains, or ought to remain, in his hands. In the mean time the defendant not only has the right, but is bound to retain such surplus for the purpose of applying it in satisfaction of any judgments that may be recovered by those attaching creditors whose suits are claimed to have been suspended by the order staying proceedings.

The judgment of the district court is affirmed.

14	419
18	445
5*	68

[No. 944.]

CATHERINE DALTON, APPELLANT, v. PETER DALTON, RESPONDENT.

WHEN EQUITY WILL RELIEVE A PERSON WHO HAS BEEN DECEIVED.—

Plaintiff is the mother of the defendant, and brought this action to recover certain lands upon the ground that defendant obtained the legal title thereto through fraud. She is over sixty years of age, and can neither read nor write. She was induced by certain alleged fraudulent representation of her son, to convey the property to M., who thereafter conveyed the same to defendant. *Held*, that the circumstances demanded of the defendant the utmost sincerity and fair dealing; that if plaintiff, having confided in defendant—as a mother has good reason to think she may confide in a son—was actually misled, she is entitled to relief in a court of equity.

Argument for Respondent.

EVIDENCE ADMITTED WITHOUT OBJECTION.—Parol evidence to establish a trust was admitted without objection. *Held*, that it was too late to raise the objection on appeal to this court, and that it must be considered and given its full value.

SUFFICIENCY OF EVIDENCE TO ESTABLISH A TRUST.—Parol evidence to defeat a deed and establish a trust, must be clear, and attended with no uncertainty, and even then should be received with great caution.

IDEM—INSUFFICIENCY OF EVIDENCE TO SUPPORT FINDING.—*Held*, upon a review of all the facts, that the testimony was insufficient to support a finding, that plaintiff paid no consideration for the property in question, but held it in trust for defendant.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts are stated in the opinion.

W. Webster and W. L. Knox, for Appellant.

The evidence shows a consideration for the deed made by McKay to appellant.

A trust can not be shown by parol evidence. (2 Leading Cases in Eq. 670, 715.) To allow the defendant to attack the deed by parol evidence, would be clearly in contravention of the statute of frauds. (*Wilkinson v. Wilkinson*, 2 Dev. Eq. 376; *Morris v. Morris*, 2 Bibb. 311; 2 Eq. L. C. 716, 717; *Hill on Trustees*, 171; 2 St. Eq. J. 1199, note 1, to sec. 1199, 553.)

Robert M. Clarke and N. Soderberg, for Respondent.

I. The evidence in the record is sufficient to support the findings. (*Boskowitz v. Davis*, 12 Nev. 468.) The plaintiff voluntarily conveyed the property to Manning. Defendant's money paid for the land, and neither McKay nor plaintiff ever had any interest in the land, but acted solely as trustees for defendant. (1 Perry on Trusts, sec. 126.)

There was an express promise by plaintiff to hold the land in trust for defendant, and in pursuance of that understanding there was a delivery of possession, entry, and occupation of the property by defendant, whereby the contract was taken out of the operation of the statute. (*Church v. Sterling*, 16 Conn. 388; *Wagoner v. Speck*, 3 Ohio R. 294-6; *Bayles v. Baxter*, 22 Cal. 575; 18 Conn. 228.)

A resulting trust having once attached to real property (no rights of innocent purchasers being involved) continues to bind the property in the hands of the trustee and his grantees, until released by the *cestui que trust*. (*Williams v. Van Tuyl*, 2 Ohio St. 336; 53 Maine, 407.)

II. Defendant being a stranger to the deed from McKay to plaintiff, is not estopped by any recital in the deed, from raising a trust by parol in favor of himself. (5 Cush. 431.)

III. If the proof on that point was incompetent the objection should have been taken on the trial, or before the decree was entered. (*Johnson v. Brooks*, 29 Cal. 223; *Curia v. Packard*, Id. 194; *McCloud v. O'Neill*, 16 Id. 392; *Jackson v. Jackson*, 5 Cow. 173.)

By the Court, LEONARD, J.:

This action was brought to recover certain lands and a water right in connection therewith, upon the ground that respondent obtained from appellant the legal title thereto through fraud. The cause was tried by the court without a jury. Respondent recovered judgment in his favor.

Appellant moved for a new trial upon the grounds that the evidence did not justify the findings and decision of the court, and that they were against law. This appeal is taken from the order overruling that motion and from the judgment.

The findings of the court are as follows:

"1. On and prior to October 5, 1874, one Donald McKay had and held the title to the lands described in the pleadings herein, but in trust, for the use and benefit of defendant, Peter Dalton, and in no other manner, and for no other use, benefit, or purpose whatever.

"2. That afterwards, on the said fifth day of October, 1874, the said Donald McKay, at the instance and request of said Peter Dalton, the defendant, and without any consideration whatever, and for the use and benefit of the said Peter Dalton, conveyed the said land and premises to the plaintiff, Catherine Dalton, and the said Catherine Dalton then took and received the said conveyance for the use and benefit of the said Peter Dalton, defendant, and in trust for him, with-

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out giving, paying, or surrendering any consideration therefor, but with the express agreement to hold the said title for the sole use and benefit of the defendant, and to convey the same to him, or to his use, whenever requested.

“3. That afterwards, and on the twentieth day of April, 1876, the plaintiff, Catherine Dalton, still holding the said title for the use and purposes, and in trust and in the manner, aforesaid, at the instance and upon the request of the defendant, Peter Dalton, and without any consideration paid, or agreed to be paid, conveyed the said premises to A. H. Manning in trust, and for the use and benefit of the defendant, Peter Dalton; and the said A. H. Manning, without the payment of any consideration, took the said conveyance in trust for the defendant, and agreed to hold the same for the sole use and benefit of, and agreed to convey the said premises to, the defendant, and to the defendant's use, whenever requested.

“4. That afterwards, and on the first day of May, 1877, the said A. H. Manning, at the instance and upon the request of said defendant, and without the payment to him of any sum of money or consideration whatever, conveyed the said title and premises to the defendant, Peter Dalton.

“5. That ever since the fifth day of October, 1874, the said Peter Dalton has had the equitable right to, and beneficial interest in, the said premises, and has had the possession, use, and benefit thereof, and ever since the first day of May, 1876, the said Peter Dalton has had the legal title to said land and premises, and has had the possession and use thereof, and has been, and now is, the owner of the same and every part thereof.

“6. The court further finds that it is not true, as alleged in said complaint, that the plaintiff, Catherine Dalton, is the owner of any part of the real estate described in the complaint, or that she ever was such owner, or that she ever had any right to, or interest in, the same, otherwise than as hereinbefore expressly stated. That it is not true, as in the said complaint alleged, that the said plaintiff ever gave or rendered any consideration whatever for the said real estate, or that the said conveyance was made in considera-

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tion of moneys advanced, or work or labor performed, or for care, or providing for defendant when sick, or for money charges incurred or paid in defendant's sickness, or in consideration of love and affection. That it is not true, as alleged in said complaint, that defendant committed any fraud, or made the alleged false and fraudulent representations, or any of them, or in any manner, as in the complaint alleged, or otherwise, defrauded, cheated, misled, deceived, or improperly influenced the plaintiff. On the contrary, plaintiff well knew the purport of her said conveyance to Manning, and that the same was to be without consideration to her, and for the use and benefit of the defendant."

"As conclusions of law, the court finds that the conveyance from Catherine Dalton to A. H. Manning, and the conveyance from A. H. Manning to the defendant, Peter Dalton, were not fraudulent, but were entirely valid, and that the defendant, Peter Dalton, is entitled to have judgment against the plaintiff; that she (he) go hence without day, and for his costs, and it is so ordered."

It is proper, first, to consider that portion of the sixth finding of fact, wherein it is found that respondent did not act fraudulently with appellant in obtaining the deed from her to Manning, and from the latter to himself; that he did not in any manner defraud, cheat, mislead, deceive, or improperly influence appellant; for the finding in question, if correct, should, and does, deprive appellant of the relief sought, regardless of other facts found and proved. If there was no fraud, concealment, or undue influence, by which respondent obtained the legal title to the property in question, then appellant is bound by her deed to Manning. If, on the contrary, fraud should have been found, she is entitled to relief, if the case in other respects entitles her thereto.

The record shows the following facts: Appellant is an old lady—over sixty years of age—and is respondent's mother. She can neither read nor write. He naturally had great influence over her, and such was evidently the fact. Indeed, one witness, Holt, testified that he had known them about seven years—had been to their place, and they had been to

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his; that he had an influence over her in business; that she trusted everything to him; that what he said was law to her; that he did all the business, and whether it was wrong or right, it was right with her.

She testified: "He told me he had sold his ranch (the Bowker ranch), to a man in Sierra Valley, and wanted me to sell mine. He said he would take the money and go to Oakland to live, and would give me all the money I wanted. He said he could sell his ranch better if I would sell mine. I consented to sell. I made a deed four or five days after this. He came to my bed when I was sick and told me this. When I made the deed, I thought I was making a deed to a man in Sierra Valley, but it was to a man in town. When I signed the deed, I was not informed to whom the deed was made. * * * This was on Saturday. Peter went with me. He said he would go in on Monday and get the money. He said: 'Don't tell anybody what I have done.' I went to town afterwards, and Mr. Williams told me what I had done—that I had sold the ranch to Mr. Manning. * * * I stayed as long as I could in the house with him and his wife after they married. I told him he and his wife might have trouble, and she would get his property. I told him if the deed was made to me I would not sell it. When I got the deed from McKay I was living with him. * * * I saw the deed in Mr. Williams' office. I put my hand to the pen. The deed was not read to me. I thought it was to a man in Sierra Valley. I have no money now. I believed what Peter told me about selling his ranch to a man in Sierra Valley, but what he told me was not true."

The testimony of Mr. Williams, who drew up the deed, shows that it was drawn at the request of respondent, two or three days before it was signed. The mother and son went to the office together. The latter asked for the deed. It was not read to her, nor did she have any notice of its contents before she executed it. The deed from appellant to Manning was executed on Saturday, and that from Manning to respondent on the Monday following. Manning testified: "I know of a deed being executed to me of the Libby and Lambirth ranch by Mrs. Dalton. Peter spoke

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to me about it before the deed was executed. His mother did not. He wanted me to take the deed from her. I paid nothing. It was understood that I took the deed in trust for Peter Dalton—*understood with him*. Had no money interest in it. I did it as a favor to him." The deeds from McKay to appellant, from the latter to Manning, and from him to respondent, were all bargain and sale deeds, containing covenants of warranty, with a consideration, as stated, of two thousand dollars.

Appellant claimed in her complaint, and testified at the trial, that the property in controversy was conveyed to her by McKay (who, in fact, held the title in trust for respondent), at the request of her son, in satisfaction of moneys due to her from him. Bridget Duffy testified to the same; while respondent claimed and testified that he owed his mother nothing; that she paid nothing, either to McKay or to him; that his mother wanted ten or twenty acres of the Bowker ranch, and to pacify her he concluded to give her a deed of the whole ranch in question; that she agreed to hold it for him. Respondent testified as follows: "At the time of the deed to Manning I had some talk of selling my ranch to a man in Sierra Valley. I told her I wanted to sell out, and so I did. She would be safe. I would always take care of her. I told her that she should be supported, if I had to go to work to do it. There was no agreement that any amount of money should be given her; nothing was said about the amount to be received, or about any money for her or her interest. I told her the deed was to Manning, but did not say what Manning. After the deed was made, she said 'everything was mine now.' She gave all up to me. She knew that I had not sold the ranch at that time. I have always been ready and willing to support her."

The mildest possible construction that can be put upon his testimony, as well as hers, is that he intended to conceal from her many important facts, and to induce her to believe in the existence of other facts that did not have any real foundation. It can not be doubted that at the time of the deed from her to Manning, his concealed intention was to

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get the legal title in himself. He had already asked Manning to take the title and hold it for him, and on the very next week day that object was consummated by a conveyance from Manning. He has held the property ever since, and there is no proof that he made any effort to sell either to a man in Sierra Valley or to any one else. It is plain to our minds that he kept his real intentions to himself, while he told her that his object was entirely different. No reason is given, and it is difficult to perceive what ones can be assigned, why he had the title passed from her to Manning, and directly from the latter to himself, instead of taking it in the first instance from her.

No reason is given why he asked her to keep secret the fact that she had conveyed the property, and we can perceive none, except that he wished to get the deed from Manning before the truth should come to light. He does not deny that he told her not to tell what had been done, or that he told her, when she executed the deed, that he would go to Reno on Monday and get the money; thus showing that she supposed she was selling the ranch outright for money, instead of to Manning in trust for her son. All the circumstances demanded of him the utmost sincerity and fair dealing. She could not read, and it was his duty to tell her what she was doing, and the effect of her deed, without concealment of any important fact. She was old, and confided in him as a mother has good reason to think she may confide in a son. She was deceived, and equity comes to her relief. (Perry on Trusts, sec. 166, *et seq.*)

That portion of the sixth finding under consideration is not sustained by the evidence, so far as it relates to the only material question to be considered here, that is to say, whether or not respondent obtained the legal title by such arts and acts, that equity will not permit him to hold and enjoy any beneficial interest in, or use of, the property, if it ought to be enjoyed by appellant.

All the evidence in the case was admitted without objection, so far as the record shows. It is, therefore, too late now to object to the manner of proof. It was the duty of the court below to give it its full value, and our duty is the

same. (*Sherwood v. Sissa*, 5 Nev. 355; *McCloud v. O'Neill*, 16 Cal. 397.)

We shall not consider whether respondent was such a stranger to the deed from McKay, that the general rules applicable to parties to written instruments did not apply to him, and that he could contradict its terms by parol by showing that no consideration was paid by appellant; or whether such parol evidence when given was competent to raise a resulting trust, and thus vary the character of the deed as a bargain and sale with covenants of warranty between the parties, by engrafting upon it any condition, limitation, or reservation, inconsistent with its terms; or whether an express trust can be proven by parol testimony that is admitted without objection. But without expressing any opinion as to how they should be answered, if occasion required, and for the purpose of this case only, we shall resolve the above questions in favor of respondent.

How then does the case stand? The burden of proof to show a trust was upon respondent. His claim is opposed by the deed, and his answer setting up a trust is deemed denied by appellant. If it be admitted that a trust ought to have been found, if the proof was sufficient to sustain the finding that appellant paid no consideration, it certainly can not be claimed that a trust arose, if appellant paid the valuable consideration stated in her testimony. If the clearest and strongest testimony must be produced to show a resulting trust in favor of one who claims to have paid the purchase money, when the deed is in the name of another, it must be true in this case, that the same certainty of proof is required to show that no valuable consideration was paid. Parol evidence of any fact that will defeat the apparent object and effect of a deed must be clear, and attended with no uncertainty, and even then should be received with great caution. If the law was otherwise, the door would be opened wide to fraud and perjury, and no man could rest in safety upon his title. In the great case of *Cook v. Fountain*, 2 Swanston, 591, it is well said that "there is one good, general, and infallible rule that goes

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to both of these kinds of trusts (express and implied); it is such a general rule as never deceives; a general rule to which there is no exception, and that is this: the law never implies, the court never presumes a trust, but in case of absolute necessity. The reason of this rule is sacred; for if the chancery do once take liberty to construe a trust by implication of law, or to presume a trust unnecessarily, a way is opened to the lord chancellor to construe or presume any man in England out of his estate; and so at last every case in court will become *casus pro amico*."

In *Graves v. Graves*, 29 N. H. 145, it is said: "In the class of cases where it is held that a trust results to the party who owns the money, it is held that the evidence must be clear as to the ownership of the money. (2 Fonb. Eq. 117.) And in a case of this kind, the proof of want of consideration ought to be equally satisfactory." The fact on which the plaintiff relied in that case, was that there was never any consideration paid.

"The claim in this case is opposed by the face of the patent and by the answer of the trustee. These, we agree, may be contradicted by parol evidence, but to succeed against them, the clearest and strongest testimony must be produced. * * * A bill, when denied, must be proved by at least two witnesses, or by one witness and corroborating circumstances." (*Jennison v. Graves*, 2 Blackf. 448; *Smith v. Brush*, 1 Johns. Ch. 459; *Boyd v. McLean*, Id. 591; *Clarke v. Quackenbos et al.* 27 Ill. 288; *Greer v. Baughman*, 13 Md. 268; *Brawner v. Staup*, 21 Id. 337; *Harrison v. McMenomy*, 2 Edw. Ch. 255; *McBarron et al. v. Glass et al.*, 30 Pa. St. 134; *Holder and wife v. Nunnally et al.* 2 Cald. 288; *Grooms v. Rust*, 27 Tex. 231; *Frederick v. Haas*, 5 Nev. 394; *Millard v. Hathaway*, 27 Cal. 119.)

It remains to examine the testimony in the light of the above cases, keeping in mind also the fact, that if it was competent for appellant to show a want of consideration by parol, it was equally so for respondent to rebut such testimony by the same kind of proof.

Respondent was a witness for himself, and upon his testimony the findings must have been based.

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He testified that he paid for the Bowker ranch in 1870, which he now owns; also, that he paid for the property in question; that he got McKay to buy it for the reason that the parties who owned it would not sell to him; that no part of the money paid for either belonged to his mother; that it was all his own; that she paid nothing for it at any time, but was to take the title and hold it for him; that Mrs. Duffy was at the ranch when the deed was made by McKay; that he never told his mother or Mrs. Duffy that he knew he owed his mother money that she gave him to buy the Dalton (Bowker) ranch; that he never said to Mrs. Duffy, or to his mother, that he owed her money and gave her the deed in satisfaction of the debt. But he did not testify that he did not owe her anything, or that he did not give the deed in satisfaction of the debt, except by inference from his statement that the purchase-money of both ranches belonged to him.

Against the above is the testimony of appellant, Mrs. Duffy, Hill, and Lyell.

The first said: "I gave Peter all the money I made to buy the Bowker ranch. * * * I gave him three thousand eight hundred dollars (probably two thousand eight hundred dollars) to buy the Bowker Ranch with, of my own money. I gave him the money to put in the bank at the Bay, and I gave him the book. I had been twenty years earning the money. Whenever I made a little money I gave it to him to put in the bank." She then stated that he was sick for a long time; that she took care of him and paid his doctor's bills, and continued: "He gave me this ranch for my money that I let him have to pay for his other ranch. Mrs. Duffy did this business for me. She talked to Peter about it, and he agreed to give me this ranch for my interest in the ranch he lives on. He said he could not get his wife to sign a deed of his other ranch, and he would give me a deed of this that McKay had. He brought me the deed, and told me what it was for. * * * My son came with me from Illinois to California in 1864. He paid my passage, but I gave him some money to pay it. I brought with me one hundred and fifty dollars in gold and ten dollars in silver. I gave that money to him and he put it in

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the bank. He and I earned more, and then he bought the property. We had a bank book. It was in his own name. I gave him all the money I had to put along with his own. I kept house. My son lived with me. I used to work out the house rent.

Hill testified that before purchasing the Bowker ranch respondent stated to him that he was going to buy a ranch; witness told him about the Bowker place, and told him it could be bought for four thousand dollars. Both went to look at it. Respondent told witness he had some money with him, but not enough to pay for the ranch; that his mother had some, and could pay three thousand dollars down. Respondent did not say how much he had.

Lyell knew that appellant kept house for her son before his marriage.

Mrs. Duffy testified that she knew appellant advanced money to respondent to purchase the Bowker ranch—knew she worked and saved money for six years, while he was sick and unable to do anything; that afterwards, for six years, she did the housework on the ranch, which entitled her to good wages. Witness said: "I heard Catherine Dalton and Peter converse about their business affairs. He stated to her in my presence that he knew his mother had advanced him money and rendered him services that entitled her to a home, and that he was willing to give it to her. It was after that he brought her the deed of the ranch held in the name of McKay. The conversation was on Peter's ranch. Dalton admitted to me that he had his mother's money or earnings, and all went to purchase the ranch. The amount I could not say; no amount was mentioned. Neither the mother nor the son knew the amount. There was no account kept between them. Peter did not say, and could not say, what amount he owed her, but was willing to give her a deed for that portion of the ranch for her services and money. About a week after their conversation he brought her the deed."

We have no hesitation in saying that respondent's unsupported testimony, opposed by appellant and by Mrs. Duffy, who were corroborated by Hill and Lyell, was wholly

Argument for Petitioner.

insufficient to support the finding that appellant paid no consideration for the property in question, but held it in trust for respondent. (See *Groff v. Rohrer*, 35 Md. 336.)

The order and judgment appealed from are reversed and the cause remanded.

[No. 995.]

FLORAL SPRINGS WATER COMPANY, PETITIONER, v.
HENRY RIVES, DISTRICT JUDGE, RESPONDENT.

MANDAMUS—WILL BE ISSUED TO COMPEL COURTS TO TRY CAUSES.—If the district court refuses to try a cause on the ground that it has no jurisdiction, and it appears that the court has jurisdiction, the writ of mandate will be issued to compel the court to hear and decide the cause upon its merits.

JUSTICE OF THE PEACE—JURISDICTION—ACTION AGAINST COUNTY.—A justice of the peace has jurisdiction of an action against a county for a sum less than three hundred dollars.

APPLICATION for mandamus.

The facts sufficiently appear in the opinion of the court.

Geo. S. Sawyer and *T. W. W. Davies*, for Petitioner.

Petitioner is entitled to the writ of mandamus. The writ is granted where a person has a legal right to insist that a certain act shall be done, the performance of which is by law made the duty of a public officer. (*Treadway v. Wright*, 4 Nev. 119; 3 Stephens' *Nisi Prius*, 2292; Redfield on Railways, 441 n. 5; *People v. Judge Wayne Co.* 1 Manning's; Michigan Rep. 359; *In the matter of Jas. Turner*, 5 Ohio, 542; Moses on Mandamus, chaps. 2 and 3; Stat. of Nev. 1869, 264.)

The justice has jurisdiction of the action against the county. (Stat. 1861, 127-8, sec. 11 and 23; Stat. 1864, 45, 138, sec. 3, 257, sec. 24; Constitution, Art. VI., sec 8; Art. VIII., secs. 2, 5, 10; Art. IX., sec. 4; 1 Comp. Laws, 1570.)

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A. C. Ellis, for Respondent.

I. A justice's court has no jurisdiction of any suit against a county. (Comp. Laws, 100, 101, 102, 103.)

At common law a county could not be sued at all in any court; and the authority to sue being strictly statutory, the statute must be strictly pursued as to the tribunal in which the action may be brought and tried, the mode of service, etc. (*Gilman v. Contra Costa county*, 8 Cal. 57; *Hunsaker v. Borden*, 5 Id. 290; *Hastings v. San Francisco*, 18 Id. 57.)

A county is a part of the state, a political subdivision of the state, and the sovereign can never be sued without its consent, and in the courts which it prescribes. (*Sharp v. Contra Costa county*, 34 Cal. 291; *Clarke v. Lyon county*, 8 Nev. 185; *McBane v. The People ex rel. Stout*, 50 Ill. 506.)

II. The act of the legislature of the state of Nevada, approved March 8, 1865, entitled "An act to create a board of county commissioners in the several counties of this state, and to define their duties and powers," does not confer the right to sue a county. This statute does not deal with the jurisdiction of the courts. Its title in no sense so indicates. It creates and defines the powers of a body, different from the courts of the state, and without judicial powers and functions.

But so far as it may be claimed that this law confers or regulates the jurisdiction of the courts of the state, the law is clearly unconstitutional. It was not intended to and does not confer jurisdiction on the state courts. (Art. IV., sec. 17, Const; *Waitz v. Ormsby county*, 1 Nev. 374; *Clarke v. Lyon county*, 8 Id. 186.)

III. The jurisdiction of justices' courts is limited and special, and no presumption can be indulged in favor of their jurisdiction. (*Swain v. Chase*, 12 Cal. 283; *Rowley v. Howard*, 23 Id. 401; *King v. Randlett*, 33 Id. 318; *Paul v. Beegan*, 1 Nev. 327; *McDonald v. Prescott & Clark*, 2 Id. 109; *Paul v. Armstrong*, 1 Id. 82; *Mullett v. Uncle Sam M. Co.*, Id. 188; *Little v. Currie*, 5 Id. 90.)

By the Court, BEATTY, C. J.:

This is an application for a peremptory writ of mandamus. The substance of the petition is that the petitioner in April,

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1879, recovered a judgment against the county of Lincoln, in an action duly commenced in a justice's court; that the county appealed to the district court, and that the respondent, who is district judge, refuses to try the action, upon the ground that justices of the peace have no jurisdiction of actions against counties, and consequently that the district court could acquire no jurisdiction of this case, by appeal from the justice's court.

The respondent demurs, and answers at the same time. The answer, however, as well as the demurrer, admits all the allegations of the petition; and the new matter alleged on the part of the respondent was not proved, and is not relied on. The only question to be decided, therefore, is this: has a justice of the peace jurisdiction of an action against a county for a sum less than three hundred dollars? For, if he has, this case falls clearly within the rule of *Cavanaugh v. Wright*, 2 Nev. 166, in which it was held, or at least assumed—and we have no doubt correctly—that if upon a mistaken view of the law the district court refuses to try a cause, on the ground that it has no jurisdiction, and it clearly appears, from the admitted facts, that it has jurisdiction, and that all preliminary conditions to its action have been complied with, and the cause is still pending, in such case, if there is no other plain, speedy, and adequate remedy, this court should issue its mandate to the district court, to hear and decide such cause on its merits.

The decision in *Treadway v. Wright*, 4 Nev. 119, does not overrule that in *Cavanaugh v. Wright*, and if it be true that the distinction which it attempts to draw between the two cases is without any substance or validity, what follows is that the latter and not the former decision is wrong.

Returning, then, to the only question in the case, we are satisfied that the district court erred in holding that justices of the peace have no jurisdiction of actions against counties.

It is conceded that without express authority from the legislature a county can not be sued, and that the right to maintain such suits can only be enjoyed upon the condi-

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tions which the legislature sees fit to impose. It is conceded also that the only statute authorizing suits against counties in this state is the act of the territorial legislature approved February 16, 1864. (Stats. 1864, p. 45.) But it does not follow, as claimed by respondent, that the only courts in which such suits can be brought are those which are mentioned in that statute; for if this was so, a county could no longer be sued at all, the courts therein mentioned (*i. e.* the United States district courts for the territory of Nevada) having been abolished by the adoption of the state constitution and the organization of the state government. There is no more identity between the district courts of the state of Nevada and the courts mentioned in the statute of 1864 than there is between those courts and the justices' courts. Yet it has never been questioned since the decision of *Waitz v. Ormsby County*, 1 Nev. 370, that the right to sue counties remains, notwithstanding the fact that the only courts in which the statute authorizes them to be sued were utterly abolished on the admission of Nevada as a member of the federal union. In that case and in every subsequent case in which a county has been sued, it was either expressly decided, or tacitly assumed, that the right to sue a county, conferred by the act of 1864, not being repugnant to anything in the constitution or subsequent state legislation, remained intact. But it was not held, and could not have been held, that the jurisdiction of such actions continued as therein prescribed. The courts then in existence had been abolished, and the jurisdiction of the new courts which were erected in their place had been regulated by constitutional provisions, applicable to all kinds of actions. Under those provisions the jurisdiction of an action against a county is determined by the same rule that determines the jurisdiction of actions against natural persons. If the subject-matter of an action is a money demand not exceeding three hundred dollars, the jurisdiction of the district court is excluded (Constitution, Art VI., sec. 6), and it must belong (originally) to the justices' courts if the right of action exists. (Constitution, Art. VI, sec. 8, and Statutes 1864-5, p. 114, sec. 29.)

Points decided.

That the right to sue a county on demands under as well as over three hundred dollars does exist can not be doubted. The statute of 1864 confers it, and nothing in the constitution or any subsequent statute has taken it away. But the jurisdiction of all such actions has been vested in other courts, and whether it belongs to the district court or to a justice of the peace is determined in each individual case by the subject-matter of the action, *i. e.* the amount involved. As the amount involved in petitioner's action against Lincoln county was less than three hundred dollars, it follows that the action was properly commenced in justice's court, and that the district court has jurisdiction of the appeal.

It is, therefore, ordered that the peremptory writ issue as prayed for.

HAWLEY, J., concurring.:

There is, in my opinion, a wide, plain and clear distinction, in principle, between the cases of *Cavanaugh v. Wright*, 2 Nev. 166, and *The State ex rel. Treadway v. Wright*, 4 Nev. 119. In my judgment both cases are correct.

In every case where an appeal has been taken from the justice's court it is the duty of the district judge, upon proper request, to make such disposition of the case as, in his judgment, the law and facts may warrant.

If he proceeds and disposes of the case, the writ of mandamus cannot be used to review his action. But if he refuses, the writ will be issued to compel him to act. As the district judge refused to act, I concur in the order directing the issuance of the writ.

[No. 980.]

N. LEVY, APPELLANT, v. JAMES ELLIOTT, RESPONDENT.

SUNDAY—ATTACHMENT.—An attachment suit can be commenced and the writ served on Sunday whenever the plaintiff, or some person in his behalf, makes the affidavit required by section 50 of the act concerning courts of justice. (1 Comp. L. 955.)

Argument for Respondent.

IDEM—SUFFICIENCY OF AFFIDAVIT.—The use of the word *upon* instead of *by* in the affidavit: *Held*, to be a clerical mistake, which did not destroy the sufficiency of the affidavit.

APPEAL from the District Court of the Fourth Judicial District, Humboldt County.

The facts appear in the opinion.

Robert M. Clarke, for Appellant.

The power to issue the writ is expressly enumerated in the statute, and this by implication carries the power to do everything necessary to the issuance of the writ. Any other interpretation would destroy the act and overthrow the intention of the law-makers. The act in terms only provides that the writ may issue. The law grants the right to have the writ issue. It therefore grants also the right to do all things necessary to that end.

Kirkpatrick & Stephens, for Respondent.

Sunday laws are declared to be founded on public policy, and promotive of the principles of religion and morality, for it is held that the dedication of the Sabbath to religious rest and worship is of divine authority and perpetual obligation. (*People v. Hoym*, 20 How. Pr. 76; *Rice v. Mead*, 22 Id. 445; *Story v. Elliott*, 8 Cow. 27.)

It is obvious from the provisions of our statutes on the subject that the law-makers intended to require a strict observance of the fourth commandment, and it is irresistibly clear that they regarded the transaction of public or judicial business as a desecration of the Lord's day—to be rigidly prohibited. Such being the manifest spirit of this legislation, it must be read and interpreted in the light of the legislative intention, so as to promote the high moral and religious purpose in view. Nothing is to be taken by implication. The exceptions contained in the act must be restrained within their very letter.

The remedy by attachment is, under our system, a harsh one. In its practical operation it is always oppressive and generally inequitable and unjust. It exhausts the property

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of the unfortunate debtor in costs. It breaks up and ruins his business and credit, and this, in advance of a hearing, and without allowing him his day in court. It ignores the principle of equitable distribution—giving an absolute preference to the prior attaching creditor. There is nothing in the end to be accomplished that should incline the court to relax the laws which protect the Lord's day from desecration.

S. S. Grass, also for Respondent.

By the Court, BEATTY, C. J.:

This action was, on motion of the defendant, dismissed by the district court, on the ground that the proceedings were void by reason of the fact that the complaint was filed and summons issued on Sunday.

The plaintiff appeals from the judgment of dismissal, and the only questions in the case are:

1. Can an attachment suit be commenced in this state on Sunday?
2. If so, did the plaintiff in this case make a proper affidavit to entitle him to the privilege?

The fiftieth section of the act concerning courts of justice, etc. (C. L. sec. 955), is as follows:

“Section 50. No court shall be open, nor shall any judicial business be transacted on Sunday, on New Year's Day, on the Fourth of July, * * * except for the following purposes: * * * Fourth—For the issue of a writ of attachment, which writ may be issued on each and all of the days above enumerated, upon the plaintiff, or some person in his behalf, setting forth in the affidavit required by law for obtaining said writ the additional averments, as follows: That the affiant has good reason to believe, and does believe, that it will be too late for the purpose of acquiring a lien by said writ to wait till a subsequent day for the issuance of the same. And all proceedings instituted, and writs issued, and official acts done on any of the days above specified, under and by virtue of this section, shall have all the validity, force and effect of proceedings commenced on other days,” etc.

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Respondent does not deny that under this fourth exception a writ of attachment may be lawfully issued on a non-judicial day, but he contends that the right to the writ does not necessarily include the right to commence an action, and he insists that the exceptions to the rule forbidding the transaction of judicial business on non-judicial days, and especially Sundays, must be narrowly and literally construed, and not extended by implication to embrace anything that it does not include in terms. It is giving full effect to the section, he says, to hold that it merely authorizes the issuance of the writ, leaving the action to be commenced afterwards, or if this is denied, to hold that it applies in those cases only in which an action has been commenced on a secular day, and is pending when the issuance of the writ is demanded.

We think, however, that a different rule of construction applies, and that a different result follows. The statute is remedial, and ought to be liberally and beneficially construed in accordance with its object and reason. It must also be construed in connection with the statutes *in pari materia*.

An attachment is a merely ancillary remedy, and in all cases an action must be commenced or must be pending at the time the writ is issued. (Comp. Laws, sec. 1184, *et seq.*) Construing this act together with the exception above quoted, it can not be held that the latter authorizes the issuance of the writ first and the commencement of the action afterwards.

Neither can it be held that the privilege of issuing the writ on a non-judicial day is allowed only in cases where an action has been previously commenced. The plain intention of the legislature was to prevent debtors from availing themselves of the immunity of non-judicial days in order to make the remedy by attachment unavailable to some or all of their creditors; and this sole object of the law would be defeated in a great majority of instances by the construction contended for.

We think it clear that in all cases an action must be commenced or must be pending to authorize the issuance of

Points decided.

the writ of attachment, and equally clear that, under the statute, the writ may issue on a non-judicial day whenever the plaintiff, or some person in his behalf, will make the necessary affidavit. It follows necessarily that when he makes such affidavit in an action not yet commenced, his complaint not only may but must be filed, and summons issued, on Sunday the same as on other days.

But it is claimed that the plaintiff in this case did not make the necessary affidavit. Instead of saying it would be too late for the purpose of acquiring a lien *by* said writ if he waited till a subsequent day, he said it would be too late to acquire a lien *upon* said writ. This substitution of the word "upon" for "by" is evidently a clerical mistake, and does not detract from the sufficiency of the affidavit.

Our conclusion is that the court below erred in dismissing the action, and accordingly the judgment is reversed and the cause remanded for further proceedings.

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[No. 988.]

THE STATE OF NEVADA, RESPONDENT, *v.* JOHN
DAVIS, APPELLANT.

CONSTITUTION—TITLE OF AN ACT.—The act supplementary to an act entitled "An act concerning crimes and punishments, approved November 26, 1861," does, in its title, express the subject embraced therein, as required by art. IV, sec. 17 of the constitution.

ESCAPE FROM JAIL—BAD CONDITION OF JAIL NO EXCUSE.—Defendant admitted that he left the jail, and offered to prove in excuse and mitigation of his act, that the condition of the jail was intolerable, and injurious to his health, without offering to show that he had used any lawful means of relief before escaping from the jail: *Held*, that the testimony as to the condition of the jail was properly excluded.

IDEM—PLEA OF NECESSITY.—The plea of necessity in justification of acts which, without such necessity, constitute the crime charged, is unavailable without a showing that lawful measures were first adopted to accomplish the desired result.

WHAT CONSTITUTES AN ESCAPE.—If a prisoner, with or without force, goes away from his place of lawful custody without authority of law, the offense of escaping from jail is complete.

Argument for Appellant.

REASONABLE DOUBT—EXPLICIT INSTRUCTIONS.—The court instructed the jury as follows: "A reasonable doubt in the law is one founded upon a full and fair consideration of all the circumstances and evidence in the cause, both for the state and for the defendant, and is not a doubt resting upon mere conjecture or speculation." *Held*, correct as far as it goes; that if the defendant desired a more elaborate definition, he should have asked for it.

COMPETENCY OF JUROR—HYPOTHETICAL QUESTIONS IRRELEVANT.—Defendant's counsel asked a juror: "If the prosecution in this case should claim, and a court should hold, that a man confined in jail under a charge of felony, leaving the jail, the doors being open, without force, is guilty of an escape under the law, then have you formed an unqualified opinion concerning the guilt or innocence of the defendant?" *Held*, that the question was properly excluded.

IDEM—CHALLENGE PRACTICE.—The proper practice is to dispose of each challenge in the order named in the statute. If there is no challenge to the panel, or if it is made and overruled, questions appertaining alone to general disqualification should then be asked, and a challenge for that cause interposed or waived; next, questions competent in view of a challenge for implied bias only should be propounded, and a challenge for that cause interposed or waived; and last, the same course should be pursued for actual bias.

IDEM—IMPLIED BIAS—DEFENDANT'S CHARACTER.—The fact that a juror had formed an unfavorable opinion of defendant's character will not sustain a challenge for implied bias.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts sufficiently appear in the opinion of the court.

N. Soderberg, for Appellant.

I. The act under which defendant was convicted (1 Comp. Laws, 589) is unconstitutional. (Const. Nev., Art. IV., sec. 17; *State v. Silver*, 9 Nev. 227; *Parkinson v. State*, 14 Md. 194.)

II. Defendant had a right to show, in mitigation and defense, that an absolute necessity for his leaving the jail existed. It was for the jury to decide whether the facts were sufficient to justify. It was error to exclude the testimony as to the filthy and unwholesome condition of the jail. This testimony was also material as to the question of intent with which defendant left the jail. (1 Comp. Laws, 2307-8;

Argument for Respondent.

State v. Gardner, 5 Nev. 377; 37 Tex. 338; Bishop on Cr. L. 370.)

III. The definition of a reasonable doubt given by the court was calculated to mislead the jury. (*State v. Rover*, 11 Nev. 343; 51 Cal. 374.)

IV. It was error to deny defendant the opportunity of ascertaining whether the juror Stampley was competent. It was the juror's duty to know the law without any statement and he had the right to be informed what the law was. This ruling of the court deprived defendant of a substantial right.

Hypothetical questions are not always objectionable. (*State v. Arnold*, 12 Iowa, 479; *Freeman v. People*, 4 Denio, 9.)

If Stampley entertained the hypothetical opinion stated in the bill of exceptions, defendant would have been entitled to submit the question of actual bias in Stampley to triers. (*People v. Bodine*, 1 Denio, 281; *State v. Benton*, 2 Dev. & B. 196; *People v. Mather*, 4 Wend. 229.)

M. A. Murphy, Attorney-General, for Respondent.

The provisions of sec. 17 of art. 4 of our constitution is accomplished when the law has but one general object which is fairly indicated by its title. (Cooley on Const. Lim. sec. 144; *Humboldt Co. v. Churchill Co.* 6 Nev. 30; *The People v. Mahaney*, 13 Mich. 495; *Morford v. Ungar*, 8 Iowa, 82; *Bright v. McCullough*, 27 Ind. 225; *Mayor et al v. Maryland*, 30 Md. 118; *Davis v. The State*, 7 Id. 159; *Keller et al. v. Id.* 11 Id. 531; *Parkinson v. Id.* 14 Id. 190; *State ex rel. v. Town of Union*, 3 N. J. 351; *The Sun Mut. Ins. Co. v. Mayor of N. Y.*, 8 N. Y. 252.)

II. There was no error in excluding the testimony of Hart. The escape of a person arrested upon criminal process whether effected with or without force, before he is discharged by due course of law, is punishable as an offense against public justice. (2 Bish. Crim. Law, sec. 1093; *State v. Doud*, 7 Conn. 386; *Riley v. The State*, 16 Id. 47.)

III. The instruction as to reasonable doubt is correct. (*United States v. Knowles*, 4 Saw. 521; *United States v. Foulke*,

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6 McLean, 355; *Long v. The State*, 38 Ga. 508; *Commonwealth v. Drum*, 58 Pa. 22.)

IV. The questions asked the juror Stampley were properly excluded. The point to determine as to the qualification of a juror is whether at the time of his examination he has an unqualified opinion as to the guilt or innocence of the accused, and not what might be the state of his mind after hearing the evidence. (*People v. Johnston*, 46 Cal. 78; *State v. Arnold*, 12 Iowa, 479.) The forming of an opinion as to the bad character of the accused is no ground for challenge. (*People v. Allen*, 43 N. Y. 34; *People v. Mahoney*, 18 Cal. 180.)

By the Court, LEONARD, J.:

Appellant was convicted of the crime of escape from the jail of Ormsby county, when lawfully confined therein upon a charge of felony.

This appeal is taken from the judgment, from the order overruling appellant's motion in arrest of judgment, and from an order denying his motion for a new trial.

1. It is first urged by counsel for appellant that the statute under which appellant was indicted and convicted is unconstitutional, and therefore void, because it does not, in its title, express the subject embraced therein, as is required by section 17 of Article IV of the constitution. That section is as follows: "Each law enacted by the legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title." * * * The title of the statute in question (1 Comp. Laws, 589) is as follows: "An act supplementary to an act entitled 'An act concerning crimes and punishments,' approved November 26, 1861."

It is a plain proposition, that if the statute last mentioned is unconstitutional for the reason stated, then the principal statute of the state in relation to crimes and punishments is unconstitutional for the same reason, because it is only entitled, "An act concerning crimes and punishments," and embraces murder, arson, robbery, larceny, and other crimes. (1 Comp. Laws, 557.) The fact just stated is no good

reason for declaring the statute in question constitutional, if it is not so, but it is an additional reminder of the necessity of carefulness in coming to a proper conclusion. If the statute in question, in relation to escapes, would have been constitutional, had it been embodied in the original act, under the title above stated, it must be constitutional now, under the title, "An act supplementary" thereto.

The constitution only requires that each law "shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title." The subject of the statute to which the one under consideration is supplementary, is crimes; the matters properly connected therewith are the punishments therefor, and both are briefly expressed in the title. It embraces but one subject and matter properly connected therewith.

Escape, larceny, robbery, and murder are different crimes, but they are upon the same subject, viz.: *crimes*. The title truly and fairly indicates in general terms the subject of the statute. Nothing is contained therein that is not suggested by the title, and the title affords a clue to the contents of the statute. The objection under consideration is not well taken. (*Humboldt county v. The County Commissioners of Churchill county*, 6 Nev. 34; *Bright v. McCullough, Treasurer, etc.*, 27 Ind. 225; *Cooley's Const. Lim.* 141; *Davis v. The State*, 7 Md. 159; *Parkinson v. The State*, 14 Id. 196; *Mayor, etc. v. The State*, 30 Id. 118; *The Sun Mut. Ins. Co. v. The Mayor, etc.* 8 N. Y. 252.)

2. The court refused to permit Hart, witness for appellant, to answer the following question:

"What was the condition of the jail on and before the twentieth day of March last (the date of the alleged escape), as to whether it was a filthy, unwholesome, and loathsome place, full of vermin and uncleanness, or was it a clean, properly-kept institution?"

Counsel stated that he asked the question "for the purpose of showing that defendant had been confined in the jail a long time; that the condition of the jail during that time and on the twentieth day of March, 1879, was absolutely intolerable and injurious to the health of the defend-

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ant. This testimony is offered in excuse and in mitigation of the defendant's leaving the jail, and to show an absolute necessity of his leaving."

Counsel offered to prove the above state of facts by witness Hart and others. Without stating other reasons in support of the court's action, it is enough to say that appellant admitted leaving the jail. By the means employed he gained his liberty before he was delivered by the course of the law. In other words, he intentionally escaped from the jail, and in justification offered the testimony of Hart and others in relation to its condition. Appellant said in substance: "When legally confined in jail upon a charge of felony I escaped, but the condition of the jail was such that I was under the necessity of doing so." We consider it unnecessary to decide whether or not the proposed testimony would have been admissible in justification had a proper foundation be laid therefor, that is to say, had appellant shown or offered to show that he exhausted the lawful means of relief in his power before attempting the course pursued. It was not shown or claimed that he had even complained to the sheriff or the board of county commissioners, or that he had endeavored to obtain relief by any lawful means. The plea of necessity in justification of acts which, without such necessity, constituted the crime charged, was unavailable without also showing that lawful measures had first been adopted to accomplish the desired result. A person confined by the law should be delivered by the law; and no other means can be justified in any case, until the officers in charge, and the law, refuse him relief; and then the evidence of the necessity must be clear and conclusive, and the act must proceed no further than the emergency absolutely requires. (Bishop on C. L. vol. 1, sec. 352.)

The necessity, to excuse, must be real and urgent, and not created by the fault or carelessness of him who pleads it. "Where the law," observes Story, J., "imposes a prohibition, it is not left to the discretion of the citizen to comply or not; he is bound to do everything in his power to avoid an infringement of it. The necessity which will excuse

him for a breach must be instant and imminent; it must be such as leaves him without hope by ordinary means to comply with the requisitions of the law. It must be such, at least, as can not allow a different course without the greatest jeopardy of life and property. He is not permitted, as in cases of insurance, to seek a port to repair, merely because it is the most convenient, and the most for the interest of the parties concerned. He is, on the contrary, bound to seek the port of safety which first presents itself, if it be one where he may go without violation of the law. In a word, there must be, if not a physical, at least a moral, necessity to authorize the deviation. Under such circumstances the party acts at his peril; if there be any negligence or want of caution, any difficulty or danger which ordinary intrepidity might resist or overcome, or any innocent course which ordinary skill might adopt or pursue, the party can not be held guiltless, who, under such circumstances, shelters himself behind the plea of necessity." (Id. sec. 352.)

The court did not err in rejecting the evidence offered in relation to the condition of the jail.

3. The refusal to give the second and fourth instructions asked by appellant was not error. There was no proof that the door of the jail was open; but if there had been the result would have been the same. Appellant testified that the door was unlocked. Bishop defines an escape as the "going away by the prisoner himself, from his place of lawful custody, without a breaking of prison." (Bish. Crim. Law, vol. 2, sec. 1065. See, also, Hale's Pleas of the Crown, vol. 1, 605, note; Comp. Laws, sec. 2466, *et seq.*)

The keeper of a prison, or other officer having a prisoner in custody, has no right to consent to an escape; and if he does, the escaping prisoner is no less guilty. (Bish. Crim. Law, sec. 1104, and cases there cited.)

And, for reasons before stated, the fifth instruction offered by appellant is not law. Besides, had it been given, the jury would have been justified in finding for appellant, if the jail was, to any extent, loathsome and injurious to his health. Such a doctrine finds no sanction in the books, and is hardly entitled to notice.

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4. It is urged that the court erred in instructing the jury that "a reasonable doubt in the law is one founded upon a full and fair consideration of all the circumstances and evidence in the cause, both for the state and for the defendant, and is not a doubt resting upon mere conjecture or speculation."

Our most distinguished jurists have found it difficult to define reasonable doubt to their entire satisfaction. This court has adopted as correct the definition given in *Commonwealth v. Webster*, 5 Cush. 320. See *State v. Rover*, 11 Nev. 344. The instruction in question was evidently taken from *United States v. Knowles*, 4 Saw. 521, where Justice Field defined it in the precise words used in this case. See further, *Bray v. State*, 41 Tex. 561. It would be better, probably, if courts would use the language that has been passed upon and settled as correct, but a careful examination of the portion of the instruction approved in *Rover's case*, and the one given here, shows that they are substantially the same. Certainly that given in this case contains nothing erroneous. It is, at any rate, correct as far as it goes. If counsel for appellant desired a more elaborate definition, he should have asked for it. (*State v. Smith*, 10 Nev. 122.)

5. The jury were instructed that "if a person legally committed to the custody of a sheriff to answer to a charge of felony, and by such sheriff confined in the jail of his county, escape or depart therefrom, with or without force, he is guilty of escape from such jail; and if the jury find from the evidence in this case that the defendant, John Davis, was so committed and confined on or about March 20, 1879, in the county jail of Ormsby county, State of Nevada, and that while so committed and confined * * * he did depart from said jail without authority of law, then the jury are instructed that they should find the defendant guilty, as charged in the indictment."

The first portion of the instruction properly defines an escape from jail (Bish. C. L. sec. 1065; *State v. Doud*, 7 Conn. 386; Comp. Laws, 2467); and if appellant did what is stated in the last part, he was necessarily guilty; because

the doing of those acts completed the crime, even according to the theory of counsel for appellant, unless appellant was justified under the plea of necessity, and as we have seen, proof of the filthiness of the jail was not a justification without showing, or offering to show, that he first sought relief by legal means, even though he would have been justified had such proof been made or offered. So there was no proof of justification. No doubt an *intent to escape* was necessary, but no other intent was required, and that was admitted under a plea of justification which was wholly unsupported by the evidence.

6. One of the jurors, O. K. Stampley, testified upon his *voir dire*, that he knew the defendant and had read accounts in the local newspapers of the alleged escape; that he did not know what constituted the crime of escape from jail, and therefore could not answer whether he had formed or expressed an unqualified opinion touching defendant's guilt or innocence.

Counsel for appellant then asked the juror this question: "If the prosecution in this case should claim, and the court should hold, that a man confined in jail under a charge of felony, leaving the jail, the doors being open, without force, is guilty of an escape under the law, then have you formed an unqualified opinion concerning the guilt or innocence of the defendant?"

Counsel for the state objected to the question and the court excluded it, because it was hypothetical.

Counsel then asked: "Have you ever formed an unfavorable opinion of defendant's character?" That question was also excluded.

Appellant then challenged the juror for *implied* bias for having formed or expressed an unqualified opinion of the guilt or innocence of the defendant. No challenge was interposed for *actual* bias. Appellant exhausted all of his peremptory challenges, and Stampley was sworn as a juror to try the cause.

The criminal practice act (sec. 353) provides that challenges of either party must be taken separately in the following order, including in each challenge all the causes of

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the challenge belonging to the same class: "First—To the panel. Second—To an individual juror for general disqualification. Third—To an individual juror for implied bias. Fourth—To an individual juror for actual bias." Each party has an absolute right to interpose any one or all of the above-named challenges for cause, in the order named.

A challenge to the panel and for implied bias must be tried by the court, and for actual bias by triers.

One challenge has no connection with another, and the grounds for each are equally independent of others..

Questions that are competent to sustain a challenge for *actual* bias may be entirely incompetent in view of a challenge for *implied* bias. Questions to sustain a challenge for general disqualification are improper in view of a challenge for either implied or actual bias. Such being the case, the proper practice is to dispose of each challenge in the order named in the statute. If there is no challenge to the panel, or if it is made and overruled, questions appertaining alone to general disqualification should then be asked and a challenge for that cause interposed or waived; next, questions competent in view of a challenge for implied bias only, should be propounded and a challenge for that cause interposed or waived; and last, the same course should be pursued for actual bias. With such a practice the court and counsel can act intelligently, and neither party can be prejudiced. We are satisfied that such was the method intended by the legislature. In this case the court was justified in thinking (and we have no doubt that such was the fact) that the questions excluded were asked for the purpose of laying the foundation for a challenge for implied bias. The first was plainly for that purpose; the second followed immediately after the exclusion of the first, and then came a challenge for that cause only.

If the questions were not competent in view of a challenge for implied bias, but were competent to sustain a challenge for actual bias, then appellant should have challenged for the latter cause after his first challenge had been denied.

Counsel for appellant says: "It was error to deny de-

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fendant an opportunity to ascertain whether Stampley was a competent juror. He answered that he did not know what constituted the crime of escape from jail, and for that reason could not say whether he entertained an unqualified opinion of defendant's guilt."

In the first place, it is plain that the juror did not entertain an unqualified opinion of appellant's guilt or innocence. He certainly had no definite, certain, positive opinion whether appellant was guilty or innocent of the crime charged, although he stated in general terms that he could not answer whether he had such opinion or not. If, without knowing the law, he had been so unreasonable as to form such an opinion, he then knew it, and must have answered in the affirmative. But such was not the case, and had he been pressed to an answer, he must have said that he had not such opinion, and could not have, until he knew what constituted the crime charged. His idea was, and properly too, that he should not arrive at a conclusion upon the question of guilt or innocence without knowing the law as well as the facts. He did not say he believed the newspaper accounts, but admitting that he did believe what he read, still, being a candid, reasonable man, he could not say he had the disqualifying opinion. Had the juror said: "I do not know all the facts, therefore I cannot say whether I have formed an unqualified opinion or not," it would hardly be claimed that he could have been asked the following question: "If the proof should show, and the defendant should admit, that when confined in jail on a charge of felony he, without force, left the jail and departed therefrom, then have you formed an unqualified opinion as to his guilt or innocence?" But why not, according to the theory of counsel for appellant, inasmuch as the proof and admission were as stated in the question? Was not the opinion asked for as purely hypothetical as the one supposed would have been? True, it may be said that, in the case in hand, the juror's opinion, if he would have had any, depended upon the proper construction of the statute yet to be ascertained, and in the other upon facts to be proven; still, if as claimed, the question under consideration was proper because it correctly stated the law

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under which appellant was tried and convicted, we are unable to perceive why the one supposed would not have been equally proper, the proof and admission having been as therein stated.

Any question was proper which would have shown whether, as he then stood, he had formed or expressed an unqualified opinion of appellant's guilt or innocence. But none were competent which instructed him upon the law or the facts, to the end that he might form an opinion after receiving the information. Jurors are presumed to take the law from the court, and to gather the facts from the evidence admitted. But if they have formed a definite, fixed opinion—no matter why, whether upon a knowledge of the law and the facts, or either or neither—they are disqualified. On the other hand, if for any reason they have not such opinion without further instruction or information, then upon a challenge for implied bias, the law declares them competent. The law attaches the disqualification to the fact of forming or expressing an unqualified opinion upon the guilt or innocence, and does not look beyond to examine the occasion, or weigh the evidence on which that opinion is founded. (*People v. Mather*, 4 Wend. 243; *State of Iowa v. Thompson*, 9 Iowa, 190.) If a juror is in any manner, or for any cause, biased or prejudiced, by reason of what he knows, or because of his feelings, that fact can be ascertained only in view of, or upon a challenge for, actual bias.

The court did not err in excluding the first question. (*People v. Reynolds*, 16 Cal. 132; *People v. Mather*, *supra*; *People v. Honeyman*, 3 Denio, 123; *People v. Mallon*, 3 Lansing, 230; *People v. Stout*, 4 Parker's Crim. R. 71; *People v. Freeman*, 4 Denio, 10; *Schoeffler v. The State*, 3 Wis. 718; *McGowan v. The State*, 9 Yerg. 193; *Armistead's case*, 11 Leigh, 658; *State v. McClear*, 11 Nev. 39.)

7. If the juror had answered the second question in the affirmative, the answer would not have sustained a challenge for implied bias. (*People v. Allen*, 43 N. Y. 34; *People v. Mahony*, 18 Cal. 186.) That question might have been competent to sustain a challenge for actual bias, to be consid-

Points decided.

ered with other matters by triers in ascertaining the state of the juror's mind; but as before stated, it was evidently asked for the purpose of sustaining a challenge for implied bias, and no challenge was interposed for actual bias.

"It is not in general sufficient to justify the triers in setting aside a juror as not indifferent that he has formed an unfavorable opinion of the character of the accused. If it should be, notorious offenders could not be tried at all. Whether it would be a valid objection that he had read a report of the facts in the public newspapers, and had thereby imbibed an impression against the accused, must, of course, depend upon the strength of such impression. If it should be weak it would not disqualify the juror. If, however, it should be so strong that it would have any influence in forming his opinion on the trial, then he would not stand indifferent and should be rejected." (2 Barb. 222.)

We find no error in the record, and the judgment and orders appealed from are affirmed.

[No. 1010.]

EX PARTE WM. WILLOUGHBY.

COMMITMENT—REASONABLE OR PROBABLE CAUSE.—Upon the preliminary examination of petitioner upon the charge of being accessory to the murder of P. L. Traver, testimony was given to the effect that T. was deliberately killed by one Owen, on the fifth of January, 1880, in front of petitioner's saloon; that three days prior to the killing, petitioner told O. that he would give him a month's whisky, and that another man then present would give him a month's board, if he would whip or kill T. *Held*, sufficient to authorize his commitment.

FORM OF COMMITMENT.—A commitment which recites that petitioner has been held to answer the charge of murder, by being accessory before the fact, to the killing of P. L. Traver, at Metallic City, Esmeralda county, state of Nevada, on or about the fifth day of January, A. D. 1880, satisfies the requirements of the statute. (1 C. L. 1794.)

The facts are stated in the opinion.

John R. Kittrell, for Petitioner.

M. A. Murphy, Attorney-General, for the State.

Opinion of the Court—Beatty, C. J.

By the Court, BEATTY, C. J.:

The petitioner alleges that he is illegally imprisoned by Clem Ogg, sheriff of Esmeralda county, and asks to be discharged from custody upon the grounds:

1. That he was committed on a charge of murder without reasonable or probable cause; and,
2. That the warrant of commitment does not specify any offense known to the law.

Upon this petition, a writ of *habeas corpus* was issued, from the return to which it appears:

That at the examination before a justice of the peace of Esmeralda county, testimony was given to the following effect:

The petitioner keeps a saloon at Candelaria, in said county; on the second day of January, 1880, in his saloon, he told one Mike Owen that he would give him a month's whisky, and that another man then present would give him a month's board, if he would whip or kill old Traver; on the fifth of January, Owen came out of petitioner's saloon, and shot and killed Traver in the street; he was thereupon arrested, but was rescued by a gang of men, who took him back into the saloon, from which place he disappeared and made his escape.

The first question to be decided is whether this testimony, assuming it to be true, is sufficient in law to warrant the conclusion of the justice of the peace that petitioner was accessory before the fact to the crime of murder. We think it is. It makes out a *prima facie* case of a willful, deliberate and premeditated killing of Traver by Owen, without justification, excuse, or provocation, and it shows that petitioner counseled, advised, and encouraged it.

This being so, we consider ourselves bound to sustain the action of the committing magistrate. We can not go into the question of the credibility of the witnesses. That was a question for the justice of the peace to decide, and our power in reviewing his action extends no further than to determine the question above stated: Was the testimony, assuming its truth, sufficient in law to warrant the finding?

Argument for Appellant.

The second ground upon which the petitioner relies is equally unsustained. The warrant recites that William Willoughby has been held to answer the charge of murder by being an accessory before the fact to the killing of P. L. Traver, at Metallic City, Esmeralda county, state of Nevada, on or about the fifth day of January, A. D. 1880.

This satisfies all the requirements of the statute. (C. L. 1794.) It states the nature of the offense—murder—and the time when and place where committed.

The petitioner is remanded to the custody of the sheriff of Esmeralda county.

14 453
15 362

[No. 982.]

THE STATE OF NEVADA, RESPONDENT, v. WILLIAM
SOULE, APPELLANT.

GENERAL OBJECTION TO EVIDENCE—WHEN SUFFICIENT.—Where the evidence offered is wholly incompetent and inadmissible for any purpose, a general objection on the ground of incompetency is sufficient.

STATEMENT OF ONE DEFENDANT—WHEN INADMISSIBLE AGAINST HIS CO-DEFENDANT.—A statement made by one defendant, upon his preliminary examination, tending to exculpate himself and inculpate his co-defendant, is inadmissible against any one but himself.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The facts appear in the opinion.

Bishop & Sabin, for Appellant.

I. A deposition can not be introduced (save to correct or dispute the party who made it), unless the party be dead, out of the state, or absent. (1 Comp. Laws, 1779.)

II. Every person on trial in a criminal case has the right to a full and perfect cross-examination of every witness who is called to testify against him. (*State v. Larkin*, 11 Nev. 315; 1 Comp. Laws, 1779.)

The paper objected to is only a voluntary statement of one co-defendant against the other defendants and is inad-

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missible. (*State v. Ah Tom*, 8 Nev. 213, and authorities there cited; *People v. Moore*, 45 Cal. 19; *Roscoe's Cr. Ev.* 50.)

M. A. Murphy, Attorney-General, for Respondent.

I. The statements made by the defendant, Gorman, before the committing magistrate, were competent evidence against Soule. (*Greenleaf on Ev.* vol. 1, sec. 111.)

II. Defendant's objections were too general. The objections should be so stated that the attention of the court below may be directed to the exact point, so that the objection may be thus obviated if it be one of that character. (*Civ. Pr. Act, Comp. Laws*, 1252; *State v. Jones*, 7 Nev. 408; *Martin v. Travers*, 12 Cal. 243; *State v. Murphy*, 9 Nev. 394; *Dreux v. Domec*, 18 Cal. 83; *Leet v. Wilson*, 24 Id. 399; *Kiler v. Kimbal*, 10 Id. 267.)

III. The objection that the paper read to the jury was not a deposition or statement such as is contemplated by the statute, comes too late. (*Covillaud v. Tanner*, 7 Cal. 38; *Sharon v. Minnock*, 6 Nev. 382; *Robinson v. Imperial Co.* 5 Id. 44; *Potter v. Carney*, 8 Cal. 574.)

By the Court, LEONARD, J.:

Appellant, George W. Cooper, and John Gorman were jointly indicted and tried for the crime of burglary. Appellant alone was convicted. Each defendant was represented and defended by his own counsel. This appeal is taken from an order overruling appellant's motion for a new trial and from the judgment.

A reversal is asked upon several grounds, one of which only will be considered.

The record shows that "the district attorney offered a paper purporting to be the statement of John Gorman, one of the defendants, made by him upon his examination before the justice of the peace, to the introduction of which, objection was made by the attorneys of the several defendants. Attorneys for the defendant, Soule, objected to its introduction upon the grounds that it was an *ex parte* statement made in the absence of the defendant, Soule, and

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without his having had the opportunity to cross-examine the party or explain the same by other evidence; that the defendant, Gorman, being upon trial, the state could only use his statement made before the examining magistrate for the purpose of explaining or contradicting the evidence that might be given by the party on the stand in this trial; * * * that the said paper is incompetent as evidence to prove any material fact in this case; * * * that the introduction thereof as evidence is unwarranted, contrary to law, and prejudicial to the rights of the defendant Soule."

The statement was admitted, and it can not be doubted that its tendency was to exculpate defendant Gorman and to inculpate appellant. If its admission in evidence was error, it follows that a new trial must be granted.

It is claimed by the attorney-general that "if for any reason the statement was inadmissible, it was upon other and different grounds from those stated by appellant's counsel," and consequently, that the court did not err in overruling the objection made.

It is undoubtedly true, in criminal as well as in civil cases, that, as a general rule, the point of objection should, and must be, specifically stated, to the end that the attention of the court may be directed thereto; and that the opposite party may have an opportunity to obviate the objection if it be in his power to do so. (*Sharon v. Minnock*, 6 Nev. 382.) But it is also true that, if the statement of Gorman was not competent evidence against appellant for any purpose, and was prejudicial to his case, it was error to admit it against his general objection, on the ground of incompetency alone. An objection to evidence on the ground of incompetency and illegality, without a specification of the point of incompetency or illegality, does not avail the objecting party, in case the objection is overruled, if the evidence is admissible for any purpose; but if it is wholly incompetent and inadmissible for any purpose, a general objection on the ground of incompetency is sufficient, and the error will be considered and corrected on appeal.

In *Sneed v. Osborn*, 25 Cal. 627, the court said: "The appellant makes a further point, that the court erred in ad-

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mitting the testimony of H. C. Boggs, concerning the declaration of Governor Boggs, as to the boundaries of the Boggs tract, and we think it well taken. The objection was general, the ground being that it was incompetent and illegal testimony, and it would be the duty of the court to overrule an objection thus taken if the evidence was admissible for any purpose. The party objecting should lay his finger on the point of objection (*Martin v. Travers*, 12 Cal. 243, and cases cited). But here the witness stated that Governor Boggs was not then in possession of any of the land, and for that reason his declarations were not competent as evidence."

Defendants jointly indicted may be tried together; but evidence that is admissible against one can not be admitted against another if it is inadmissible as to him and a proper objection is interposed. In such a case it must be received with proper limitations. Appellant's counsel appeared and acted for him alone. They had no interest in, or power to act for, the other defendants, consequently their objections must be considered as having been limited to their client, although they did not so state in terms. It therefore follows that if the statement objected to was inadmissible for any purpose as evidence against appellant, on the ground of incompetency, it was error to admit it generally in the case, even though it was proper to be admitted against defendant Gorman. (See *Voorman v. Voight*, 46 Cal. 397.)

It remains to be considered whether the statement admitted was admissible for any purpose against appellant.

We have no hesitation in saying that it was not, and that it would not have been, had it been certified and authenticated according to law. There is no authority in the statute for such a proceeding, and we are unable to find any decision sustaining it.

In the *State v. Ah Tom*, 8 Nev. 214, the court said: "During the trial of the cause the state was allowed to introduce in evidence certain declarations made by the defendant Ah Tom to Chinese merchants in San Francisco, several days after the larceny was committed, to the effect that he was entirely innocent of the offense but knew that

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his co-defendants were guilty. Neither of the other defendants was present when this statement was made. The admission of this testimony against the objections of defendants Ah Mok, Ah Ping, and Ah Loy, was clearly erroneous.

If there had been complicity between all the defendants in the commission of the offense, the declarations made by either, after the commission of the offense, could not be used as evidence against the other defendants. A mere gratuitous assertion made by a defendant charged with a crime, exculpating himself and inculpating his co-defendants, should never be received as evidence against any one but himself.

We are satisfied that the error committed in this case was as great as in that. The fact that the statement of Gorman was made at his preliminary examination, instead of to some person out of court, can make no difference. It was still a mere gratuitous, voluntary assertion, exculpating himself and inculpating appellant, made in the absence of the latter. The admission of that evidence was prejudicial to appellant. It was incompetent as evidence against him for any purpose. It follows that the judgment and order overruling the motion for a new trial should be reversed, and it is so ordered.

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Remittitur forthwith.



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1. CERTIFICATE OF ACKNOWLEDGMENT—TESTIMONY OF NOTARY.—Where the certificate of a notary public conforms to the provisions of the statute and the notary is called as a witness and fails to state from memory the exact amount for which the mortgage was given: *Held*, that his testimony is not entitled to any greater weight than his certificate. *Musgrove v. Waitz*, 77.
2. *IDEM*.—Where the property mortgaged is situate in a compact body, and the notary and party executing the mortgage are upon the premises and the notary informs the party that the mortgage is "on all this property here:" *Held*, that this language must have been as clearly understood as if he had read the description in the mortgage. *Id*.

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1. JUSTICE OF THE PEACE—JURISDICTION—ACTION AGAINST COUNTY.—A justice of the peace has jurisdiction of an action against a county for a sum less than three hundred dollars. *Floral Springs W. Co. v. Rives*, 431.
2. CONTRIBUTORY NEGLIGENCE IN ACTIONS AGAINST RAILROAD COMPANIES. (See Railroads, 1.) 351.

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1. APPEAL TAKEN FOR DELAY—DAMAGES.—Where an appeal is taken merely for delay, damages will be awarded equal to ten per cent. of the judgment. (*Wheeler v. Floral M. & M. Co.*, 10 Nev. 200, affirmed; *Escere v. Torre*, 51; *Allen v. Mayberry*, 115; *Gammans v. Roussell*, 171.)
2. APPEAL FROM PART OF A JUDGMENT—JURISDICTION.—Where the notice of appeal specifies only a part of the judgment, and is served only upon the parties whose interests would be affected by a reversal of the part specified: *Held*, that this court has no jurisdiction over the other parties, or over the judgment in so far as it affects them. (*Dick v. Bird*, 161; *Dick v. Caldwell*, 167.)
3. ERRORS AGAINST RESPONDENT CAN NOT BE CONSIDERED.—The supreme court will only consider such questions as are assigned as error by appellant. (*Maher v. Swift*, 324.)
4. APPEAL MUST BE PROSECUTED—FAILURE TO FILE BRIEFS.—If appellant's counsel fail to appear and orally argue the case when set for trial, and also fail to file any brief within the time allowed by the court, the judgment will be affirmed without any examination of the record on appeal. (*Finlayson v. Montgomery*, 397.)

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1. ASSAULT WITH DEADLY WEAPON—INTENT.—It is the character of a weapon, and the manner in which it is used (not the purpose for which it is carried), taken in connection with the facts and circumstances of the assault, that indicate the intention of the defendant. *State v. Davis*, 407.

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JURISDICTION OF BOARD OF EQUALIZATION TO RAISE ASSESSMENT (See Certiorari, 5; Board of Equalization, 1, 2.) 140.

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ASSIGNMENT OF ERRORS MUST BE SPECIFIED. (See Evidence, 3.) 161.

ATTACHMENT.

1. ATTACHMENT LIEN—INSOLVENT DEBTOR ACT.—Under the statute of this state the lien of an attaching creditor is preserved and may be enforced

by judgment and execution, notwithstanding an order staying proceedings against the insolvent debtor made in pursuance of the act for the relief of insolvent debtors. (1 C. L. 434.) *Berryman v. Stern*, 415.

2. SUNDAY—ATTACHMENT.—An attachment suit can be commenced, and the writ served on Sunday, whenever the plaintiff, or some person in his behalf, makes the affidavit required by section 50 of the act concerning courts of justice. (1 Comp. L. 955.) *Levy v. Elliott*, 435.

3. IDEM—SUFFICIENCY OF AFFIDAVIT.—The use of the word *upon* instead of *by* in the affidavit: *Held*, to be a clerical mistake, which did not destroy the sufficiency of the affidavit. *Id.*

PROCEEDINGS IN BANKRUPTCY DISSOLVE AN ATTACHMENT. (See Sheriff, 2.) 148.

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ATTORNEYS' FEES IN CRIMINAL CASES. (See Fees, 3.) 123.

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1. JURISDICTION OF BOARD OF EQUALIZATION TO RAISE ASSESSMENT—WRITTEN COMPLAINT NOT NECESSARY.—The law does not require that a written complaint shall be filed in order to authorize the board of equalization to raise an assessment. *State ex rel. Lake v. Washoe Co.*, 140.

2. IDEM—PUBLICATION OF NAMES MERELY DIRECTORY.—The law requiring a list of persons, the valuation of whose property has been raised by the board of equalization, is merely directory. It is not a defense in a tax suit unless it has actually injured the defendant. *Id.*

JURISDICTION OF BOARD OF EQUALIZATION TO RAISE ASSESSMENT. (See Certiorari, 5.) 140.

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Williams v. Glasgow, 1 Nev. 537, in *Hunter v. Truckee Lodge I. O. O. F.*, 36.

CERTIFICATE.

- CERTIFICATE OF ACKNOWLEDGMENT—TESTIMONY OF NOTARY PUBLIC. (See Acknowledgment, 1, 2.) 77.
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CERTIORARI.

1. CERTIORARI—WHEN WILL NOT BE ISSUED—CLAIMS AGAINST COUNTY.—A writ of certiorari will not be issued to review claims against a county which have been audited, allowed, and paid. *State ex rel. Beck v. Washoe Co.*
2. IDEM—REMEDY AT LAW.—If the commissioners and auditor exceeded their jurisdiction in allowing and auditing the claims, their action would

be null and void and the remedy would be by an action at law to recover back the money paid. *Id.*

3. **IDEM—WHEN WRIT WILL ISSUE—COUNTY COMMISSIONERS.**—The power of county commissioners to allow accounts against a county is confined to those "legally chargeable," and a writ of certiorari will issue to review their action. *Id.*
4. **COSTS—TAXED AGAINST RESPONDENTS.**—Where, after the issuance of the writ of certiorari, the county commissioners and county auditor canceled the claim to be reviewed: *Held*, there being nothing in the record to show that it was the intention of such officers before the writ was issued to cancel such claim, that the costs of the proceeding should be taxed against respondents. *Id.*
5. **JURISDICTION OF BOARD OF EQUALIZATION TO RAISE ASSESSMENT.**—If the board of equalization acts without jurisdiction in raising an assessment, that is a good defense *pro tanto* in any suit for the tax, and in such a case the writ of certiorari ought not to be issued to review the action of the board. *State ex rel. Lake v. Washoe Co.*, 140.

CHALLENGE.

PRACTICE IN CHALLENGING JURORS. (See *Jury*, 3, 4.) 440.

CIVIL PRACTICE ACT.

(See *PRACTICE ACT.*)

CLAIM AND DELIVERY.

SUFFICIENCY OF PLEADINGS TO ADMIT EVIDENCE OF FRAUD. (See *Evidence*, 11.) 341.

CLAIMS.

1. **TRANSFER OF CRIMINAL CASES—IRREGULARITY IN PAYMENTS.**—Where a criminal case is transferred from one county to another, the former is liable for all costs and expenses incurred in the trial of said cause, and it can not complain of any mere irregularity in the mode of paying the expenses, in the first instance, by the latter county. [Beatty, J., dissenting in part.] *Washoe Co. v. Humboldt Co.*, 123.
2. **VERIFICATION OF CLAIMS—UNAUDITED ACCOUNTS—JURISDICTION.**—Where the expenses of a criminal trial have been properly audited in the county where the trial was had, it is unnecessary to have the same claims verified and presented as unaudited accounts to the commissioners of the county from which the cause was transferred. [Beatty, J., dissenting.] *Id.* 124.

CLAIMS AGAINST COUNTY. (See *Certiorari*, 1, 3.) 66.

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TRANSCRIBING TESTIMONY FOR THE GOVERNOR IN CRIMINAL CASES. (See *Statutes*, 2.) 66.

CLERK'S FEES IN ISSUING JUROR'S CERTIFICATES. (See *Fees*, 9.) 124.

CLERK'S FEES IN ENTERING MOTIONS AND ORDERS. (See *Fees*, 10.) 124.

COMMITMENT.

1. **COMMITMENT—REASONABLE OR PROBABLE CAUSE.**—Upon the preliminary

examination of petitioner upon the charge of being accessory to the murder of P. L. Traver, testimony was given to the effect that T. was deliberately killed by one Owen, on the fifth of January, 1880, in front of petitioner's saloon; that three days prior to the killing, petitioner told O. that he would give him a month's whisky, and that another man then present would give him a month's board, if he would whip or kill T.: *Held*, sufficient to authorize his commitment. *Ex parte Wiloughby*, 451.

2. FORM OF COMMITMENT.—A commitment which recites that petitioner has been held to answer the charge of murder, by being accessory before the fact to the killing of P. L. Traver, at Metallic City, Esmeralda county, state of Nevada, on or about the fifth day of January, A. D. 1880, satisfies the requirements of the statute. (1 C. L. 1794.) *Id.*

CONSTITUTION.

1. DISTRICT JUDGES—ARTICLE VI., SECTION 5, OF THE CONSTITUTION CONSTRUED.—In construing this provision of the constitution: *Held*, that the legislature had the power to reduce the number of district judges in the first judicial district. *State ex rel. Aude v. Kinkead*, 117.
2. ACT TO ESTABLISH STATE ASYLUM UNCONSTITUTIONAL.—The Act entitled "An act to establish and maintain a state asylum for the indigent poor and maimed of this state" (Stat. 1879, 142), is in plain conflict with section 3, Art. XIII., of the constitution. *State ex rel. Keyser v. Hallock*, 202.
3. JURISDICTION OF SUPREME COURT—CRIMINAL CASES—APPEAL.—In construing art. VI., sec. 4, of the constitution: *Held*, that the right of appeal in criminal cases is restricted to cases where the punishment adjudged is a sentence to confinement in the state prison, or to death. *State v. McCormack*, 347.
4. CONSTITUTION—TITLE OF AN ACT.—The act supplementary to an act entitled "An act concerning crimes and punishments, approved November 26, 1861," does, in its title, express the subject embraced therein, as required by Art. IV., sec. 17, of the constitution. *State v. Davis*, 439.

ART. I., SECTION 8, CONSTRUED. (See Criminal Law, 2.) 79.

REPEAL OF UNCONSTITUTIONAL ACT. (See Statutes, 4.) 202.

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|------|-------|-----------|--|
| Art. | I. | Sec. 8. | No person compelled to be a witness against himself, |
| | | | 81, 114. |
| Art. | VI. | Sec. 4. | Jurisdiction of criminal cases, 53, 348. |
| Art. | VI. | Sec. 4. | Mandamus, 340. |
| Art. | VI. | Sec. 5. | District Judges, 120. |
| Art. | VI. | Sec. 6-8. | Jurisdiction of justices' courts, 434. |
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- CONSTRUCTION OF DEED—DESCRIPTION OF PREMISES. (See Deed, 1.) 60.
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- ART. VI., SEC. 5, OF CONSTITUTION, CONSTRUED—DISTRICT JUDGES. (See Constitution, 1.) 117.
- STATUTES 1866, 140, SEC. 1, CONSTRUED—DISTRICT JUDGES. (See Statutes, 3.) 117.
- ATTORNEYS' FEES IN CRIMINAL CASES. (See Fees, 3.) 123.
- RIGHT OF HEIRS TO MAINTAIN EJECTMENT—STATUTE, CONSTRUED. (See Estates of Deceased Persons, 1.) 153.
- SECTION 68, PRACTICE ACT, CONSTRUED. (See Default, 1.) 172.
- ACT TO ESTABLISH STATE ASYLUM UNCONSTITUTIONAL. (See Constitution, 2.) 202.
- STATUTE TO PROTECT RIGHTS OF STOCKHOLDERS IN MINES, CONSTRUED. (See Statute, 5.) 311.
- SUFFICIENCY OF COMPLAINT IN ELECTION CONTEST. (See Election, 1.) 320.
- STATUTE 1877, 92, AS TO PAYMENT OF REWARDS, CONSTRUED. (See Statutes, 7, 8.) 332.
- MANDAMUS—SECTION 583, PRACTICE ACT, CONSTRUED. (See Mandamus, 1.) 336.
- ART. VI, SEC. 4, CONSTITUTION CONSTRUED—JURISDICTION OF SUPREME COURT IN CRIMINAL CASES. (See Constitution, 3.) 348.
- INTENTION OF LEGISLATURE IN CONSTRUING STATUTE. (See Statutes, 9, 10.) 365.
- STATUTES 1879, 79, MEANING OF WORD "SOLICITOR"—LICENSE TAX. (See Statute, 11.) 365.
- STATUTE AUTHORIZING ISSUANCE OF ATTACHMENT ON SUNDAY. (See Attachment, 2, 3.) 435.

CONTINUANCE.

- ABSENCE OF WITNESSES—DILIGENCE—MATERIALITY OF TESTIMONY. (See Preliminary Examination, 2.) 407.

CONTRACT.

1. AGREEMENT TO DIVIDE THE FEES OF AN OFFICE VOID, AS AGAINST PUBLIC POLICY.—An agreement made before election to divide the salary, fees, and emoluments of the office of district attorney—the consideration for said agreement being that the plaintiff should use all his influence to secure the election of the defendant to said office, is void, as against public policy. *Gaston v. Drake*, 175.
2. CONTRACT—ADMISSIBILITY OF EVIDENCE—MECHANICS' LIENS—NOMINAL DAMAGES—COSTS.—Plaintiff brings suit and claims damages against W. & R. for breach of contract in building Odd Fellows' Hall. The contract provided that the plaintiff should not be held accountable for any labor or materials furnished in said building. Plaintiff offered to prove that W. & R. had incurred indebtedness to sub-contractors and others, who had filed liens upon the building and brought suits to foreclose the same. The court refused this evidence: *Held*, 1. That plaintiff, it not being shown that it had paid anything upon said liens, was only entitled to recover nominal damages for this breach of the contract; 2. That if the plaintiff should have been allowed to prove the existence of the liens for the purpose of showing nominal damages, the error in excluding the

- proof is not ground for a new trial, when such damages do not entitle plaintiff to recover costs. *Truckee Lodge v. Wood*, 293.
3. ALTERATIONS—EXTRA WORK—WAIVER OF AGREEMENT.—The contract provided for changes in the plans, and that extra pay therefor should be either mutually agreed upon or referred to arbitrators before any changes were allowed to be made. The price for extra work had not been agreed upon or settled as the contract required: *Held*, in reviewing the testimony, that the fact that the contractors were willing to agree upon the price of changes; that they urged plaintiff to fix the same, and that plaintiff refused but continued to order changes, amounted to a waiver of the clause inserted in the contract for plaintiff's benefit. *Id.*
4. WRITTEN CONTRACT—WHEN MAY BE VARIED BY PAROL EVIDENCE.—Defendants were jointly liable, under a written contract, to H. and B. for the construction of the International Hotel. Plaintiff loaned defendant White certain money, which was used in the construction of said building, and brought suit against all the defendants as partners. On the trial, each of the defendants, other than White, was allowed to testify that he was not a partner with the defendant White; that he had no account with plaintiff, and that he had nothing to do with the contract except as a bondsman: *Held*, that this evidence was properly admitted. *Bank of Cal. v. White*, 373.
5. *IDEM*.—The rule that parol evidence is not admissible to vary the terms of a written contract, is confined in its operation to the parties to the contract, their representatives, and those claiming under them; it has no application against any party who is a stranger to the instrument. *Id.*
6. *IDEM*.—BOTH PARTIES MUST BE BOUND.—Unless both parties are bound by the contract, either is at liberty to show, by parol, a different state of facts from that set out in the writing. *Id.*
- SHERIFF'S FEES. (See Sheriff, 1.) 148.
- COLLATERAL EVIDENCE OF CONTRACT INADMISSIBLE. (See Evidence, 6.) 199.
- TAXES ARE NOT DEBTS ARISING OUT OF CONTRACTS, EXPRESS OR IMPLIED. (See Taxes, 6.) 220.
- RIGHTS OF SURETIES. (See Sureties, 4, 7.) 294.

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- TRANSFER OF CRIMINAL CASES. (See Claims, 1.) 124.
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- DAMAGES NOT SUFFICIENT TO CARRY COSTS. (See Evidence, 2.) 293. .

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(See Claims, 1-3; Fees, 1-14.) 123.

COUNTY COMMISSIONERS.

POWER TO ALLOW CLAIMS AGAINST COUNTY. (See Certiorari, 3.) 66.

ALLOWANCE OF CLAIMS. (See Fees, 1-14.) 123-4.

CRIMINAL LAW.

1. POSSESSION OF STOLEN PROPERTY.—Where there is no other evidence tending to establish the guilt of the defendant, except the fact of his having the possession of the property stolen, and the jury believe that the defendant gives a reasonable account of such possession, it would be their duty to acquit. *State v. Clifford*, 72.
2. IDENTITY OF PRISONER—EXHIBITION OF TATTOO MARKS UPON THE PERSON—ART. 1, SEC. 8, CONSTITUTION DISCUSSED AND CONSTRUED.—Upon the trial, a question was raised as to the identity of the defendant. One witness testified that he knew the defendant, and knew that he had tattoo marks (a female head and bust) on his right forearm. The court thereupon compelled the defendant, against his objection, to exhibit his arm in such a manner as to show the marks to the jury: *Held*, that this action of the court was not in violation of the clause in the state constitution, which declares that no person shall be compelled "in any criminal case, to be a witness against himself;" that it was not prejudicial to defendant and was not erroneous. (Leonard. J., dissenting.) *State v. Ah Chuey*, 79.
3. CORPUS DELICTI—CIRCUMSTANTIAL EVIDENCE.—Proof of *corpus delicti* may be shown by circumstantial evidence. *Id.* 80.
4. IDEM—SUFFICIENCY OF EVIDENCE.—Where it was shown that the house where the dead body (claimed to be the body of Ah Tong, alleged in the indictment to have been killed by Ah Chuey) was found, was used as a Chinese wash-house; that Ah Tong was the proprietor; that he was assisted by two other Chinamen; that these three persons were usually at the house; that the wash-house was being used as usual on the day of the homicide; that some human being therein was killed; that the house was consumed by fire after the homicide occurred; that the body of the deceased was badly charred; that Ah Tong had never been seen after the homicide, and that the other occupants had been seen and were alive: *Held*, that these circumstances tended to establish the fact that the body found in the wash-house was the body of Ah Tong. *Id.*
5. CRIMINAL LAW—HOMICIDE—JUSTIFICATION.—Where there is any testimony to support the plea of justifiable homicide, the court has no right to withdraw that question from the jury. A refusal to instruct the jury thereon: *Held*, erroneous. *State v. Frazier*, 210.
6. IDEM—REMARKS OF COURT.—The court, before charging the jury, said to prisoner's counsel: "That the theory of the defense was based upon the proposition that the defendant, at the time, was laboring under an aberration of mind, and therefore not responsible; that this was clearly disproven by the statement of the defendant himself," etc.: *Held*, improper. *Id.*

7. **ESCAPE FROM JAIL—BAD CONDITION OF JAIL NO EXCUSE.**—Defendant admitted that he left the jail, and offered to prove in excuse and mitigation of his act, that the condition of the jail was intolerable, and injurious to his health, without offering to show that he had used any lawful means of relief before escaping from the jail: *Held*, that the testimony as to the condition of the jail was properly excluded. *State v. Davis*, 439.
 8. **IDEM—PLEA OF NECESSITY.**—The plea of necessity in justification of acts which, without such necessity, constitute the crime charged, is unavailable without a showing that lawful measures were first adopted to accomplish the desired result. *Id.*
 9. **WHAT CONSTITUTES AN ESCAPE.**—If a prisoner, with or without force, goes away from his place of lawful custody, without authority of law, the offense of escaping from jail is complete. *Id.*
 10. **REASONABLE DOUBT—EXPLICIT INSTRUCTIONS.**—The court instructed the jury as follows: "A reasonable doubt in the law is one founded upon a full and fair consideration of all the circumstances and evidence in the cause, both for the state and for the defendant, and is not a doubt resting upon a mere conjecture or speculation:" *Held*, correct as far as it goes; that if the defendant desired a more elaborate definition, he should have asked for it. *Id.*
 11. **STATEMENT OF ONE DEFENDANT—WHEN INADMISSIBLE AGAINST HIS CO-DEFENDANT.**—A statement made by one defendant, upon his preliminary examination, tending to exculpate himself and inculpate his co-defendant, is admissible against any one but himself. *State v. Soule*, 453.
- VIOLATION OF TOWN ORDINANCE—MISDEMEANOR.** (See Jurisdiction, 1.) 52.
- LARCENY OF LOST PROPERTY—FOUND IN THE HIGHWAY.** (See Larceny, 1-3.) 72.
- TRANSFER OF CRIMINAL CASES—FEES OF OFFICERS.** (See Fees, 2-13.) 123, 124.
- INDICTMENT CONTAINING TWO COUNTS—SAME OFFENSE.** (See Indictment, 1, 2.) 288.
- JURISDICTION OF SUPREME COURT IS CONFINED TO CASES OF FELONY.** (See Constitution, 3.) 348.
- COMPETENCY OF JUROR—EXHIBITION OF NEWSPAPER ARTICLE TO REFRESH MEMORY.** (See Jury, 1.) 407.
- WAIVER OF STATUTORY RIGHT.** (See Preliminary Examination, 1.) 407.
- ABSENCE OF WITNESSES AT TRIAL WHO WERE PRESENT AT EXAMINATION.** (See Preliminary Examination, 2.) 407.
- INTENT IN MAKING ASSAULT WITH DEADLY WEAPON.** (See Assault, 1.) 407.
- CHARACTER OF WEAPON, WHETHER DEADLY OR NOT. WHEN A QUESTION OF FACT.** (See Deadly Weapon, 1.) 407.
- RIGHT OF COURT TO MODIFY INSTRUCTIONS.** (See Instructions, 1.) 407.
- COMPETENCY OF JUROR—HYPOTHETICAL QUESTIONS IRRELEVANT.** (See Jury, 2.) 440.
- PRACTICE IN CHALLENGING JURORS.** (See Jury, 3.) 440.
- REASONABLE CAUSE FOR COMMITMENT.** (See Commitment, 1.) 451.

CROSS-EXAMINATION.

CROSS-EXAMINATION OF WITNESS. (See Witness, 1.) 262.

CRIMINAL PRACTICE ACT.

Section 3. Felony, 348.

Section 4. Misdemeanor, 348.

Section 74. Indictment, 293.

Section 151. Preliminary examination, testimony reduced to writing, 412.

Section 353. Challenge to jurors, 447.

DAMAGES.

1. DAMAGES—WHAT MAY BE CONSIDERED.—The court, at plaintiff's request, gave the following instruction: "No. 5. You are instructed, that if you find for the plaintiff, in assessing damages, you will take into consideration, not only the cost of medical treatment and loss of time which the plaintiff has sustained, but also his bodily suffering; and, if the injury is permanent, such damages as he may sustain by reason of such suffering, as well as his incapacity for earning money in the future." *Held*, correct. *Cohen v. E. & P. R. R. Co.*, 377.

RULE OF DAMAGES WHEN APPEAL IS TAKEN FOR DELAY. (See Appeal, 1.) 51, 115, 171.

ADMISSIBILITY OF EVIDENCE WHERE DAMAGES ARE MERELY NOMINAL. See Contract, 2.) 293.

CONTRIBUTORY NEGLIGENCE IN ACTIONS AGAINST RAILROAD COMPANY. (See Railroads, 1.) 351.

DEADLY WEAPON.

1. DEADLY WEAPON—QUESTION OF FACT.—Where the character of the weapon, whether deadly or not, is doubtful, or where its character depends upon the particular manner in which it was used, the question is one of fact and should be submitted to the jury. *State v. Davis*, 407.
- INTENT IN MAKING ASSAULT WITH DEADLY WEAPON. (See Assault, 1.) 407.

DEBTS.

TAXES AND NOT DEBTS ARISING OUT OF CONTRACTS, EXPRESS OR IMPLIED. (See Taxes, 6.) 220.

DECLARATIONS.

DECLARATIONS OF GRANTOR IN SALE OF PERSONAL PROPERTY TO FRAUD CREDITORS. (See Sale, 1-4.) 324.

DEED.

1. CONSTRUCTION OF DEED—SUFFICIENCY OF DESCRIPTION.—Where a deed described the property as "that certain piece or parcel of timber land lying and being about forty-five miles, northerly direction, from the town of Eureka, * * * and the said timber land being known as McLeod Wood Ranch, and containing about five hundred acres more or less:" *Held*, that the deed sufficiently describes the property by name. *Paroni v. Ellison*, 60.

DEFAULT.

1. **DEFAULT—MISTAKE IN NAME OF CORPORATION—SECTION 68, PRACTICE ACT.**—Defendant was sued and served with process as "The San Francisco Sulphur Company." It suffered default. At a subsequent term it specially appeared under its true name of "The San Francisco Sulphur Mining Company," and moved to set aside the default, upon the ground of the technical mistake in its name: *Held*, it appearing that defendant had not complied with the law by filing a copy of its certificate of incorporation, that the practice act was only intended to apply for the benefit of those who have a meritorious defense, and who offer to make it, and not to those who offer a mere technical excuse for not answering in time. *Jones v. S. F. S. Co.*, 172.

DEFINITION.

- MEANING OF WORD "SOLICITOR," IN STATUTE 1879, 79.** (See Statute, 11.) 365.

DELIVERY.

See SALE.

DEMURRER.

- DEFENDANTS IN TAX SUITS MAY INTERPOSE A DEMURRER TO THE COMPLAINT.** (See Taxes, 3, 4.) 220.

DESCRIPTION.

- DESCRIPTION OF PREMISES IN MECHANIC'S LIEN.** (See Mechanic's Lien, 4.) 24.

DISTRICT JUDGE.

See JUDGE.

EASEMENT.

- RIGHT TO DRAINAGE.** (See Injunction, 1.) 17.

EJECTMENT.

- POSSESSION OF PURCHASER PRIOR TO RECEIVING DEED.** (See Evidence, 1.) 60.
- RIGHT OF HEIRS TO MAINTAIN EJECTMENT SUIT.** (See Estates of Deceased Persons, 1.) 153.

ELECTION.

1. **ELECTION CONTEST—SUFFICIENCY OF COMPLAINT.**—*Held*, that the complaint, tested either by sections 4 and 5 of the *quo warranto* act (1 C. L. 392, 383), or by section 40 of the election law (2 C. L. 2543) is sufficient. *Greely v. Holland*, 320.

EMBEZZLEMENT.

- INDICTMENT CONTAINING TWO COUNTS SETTING OUT OFFENSE IN DIFFERENT FORMS.** (See Indictment, 1, 2.) 288.

EQUITY.

1. WHEN EQUITY WILL RELIEVE A PERSON WHO HAS BEEN DECEIVED.—Plaintiff is the mother of the defendant, and brought this action to recover certain lands upon the ground that defendant obtained the legal title thereto through fraud. She is over sixty years of age, and can neither read nor write. She was induced by certain alleged fraudulent representation of her son, to convey the property to M., who thereafter conveyed the same to defendant. *Held*, that the circumstances demanded of the defendant the utmost sincerity and fair dealing; that if plaintiff, having confided in defendant—as a mother has good reason to think she may confide in a son—was actually misled, she is entitled to relief in a court of equity. *Dalton v. Dalton*, 419.

ERROR.

- ASSIGNMENT OF ERRORS MUST BE SPECIFIED. (See Evidence, 3.) 161.
- ERRORS AGAINST RESPONDENT WILL NOT BE CONSIDERED ON APPEAL. (See Appeal, 3.) 324.

ESCAPE.

- WHAT CONSTITUTES AN ESCAPE FROM JAIL—BAD CONDITION OF JAIL NO EXCUSE—PLEA OF NECESSITY. (See Criminal Law, 7, 8, 9.) 439.

ESTATES OF DECEASED PERSONS.

- HEIRS—RIGHT TO MAINTAIN EJECTMENT—ESTATES OF DECEASED PERSONS—STATUTES CONSTRUED.—In construing section 116 of the act to regulate the settlement of the estates of deceased persons (1 Comp. L. 596): *Held*, where there are no creditors to be affected, no debts outstanding against the estate, no equity in favor of the administrator, that the heirs of the estate have the right of possession, and may bring an action of ejectment in their own name to recover any property belonging to the estate. *Gosage v. Crown Point G. & S. M. Co.*, 153.

ESTOPPEL.

- WHEN TRUE OWNER IS ESTOPPED FROM ASSERTING HIS TITLE TO MINING STOCK. (See Stock, 1.) 362.

EVIDENCE.

1. EJECTMENT—POSSESSION OF PURCHASER PRIOR TO DEED.—In an action of ejectment it is admissible for plaintiff to introduce evidence that he took possession of the property after his agreement to purchase and before he received a deed, and to state what his acts of possession were. *Paroni v. Ellison*, 60.
2. TESTIMONY IMPROPERLY ADMITTED.—Where testimony has been improperly admitted under the pleadings, it ought not to be considered for any purpose. *Jeffrey v. Walsh*, 143.
3. WATER RIGHTS—FINDINGS SUSTAINED BY THE EVIDENCE—ASSIGNMENT OF ERRORS.—In reviewing the evidence as to the appropriation of water by the respective parties: *Held*, that certain findings were sustained by the evidence, except in immaterial particulars; and that other findings

were not incorrect for any reason specified in the assignment of errors. *Dick v. Bird*, 161; *Dick v. Caldwell*, 167.

4. CONFLICT OF EVIDENCE—FINDINGS.—Where there is a substantial conflict of evidence, the findings of the lower court will not be disturbed. *Ganmas v. Roussel*, 171.
5. RULE AS TO CONFLICT AND WEIGHT OF EVIDENCE ENFORCED. *Geremia v. Mayberry*, 199.
6. CONTRACT—COLLATERAL EVIDENCE INADMISSIBLE.—When there is a conflict of evidence as to whether plaintiff was to receive one dollar and ninety cents or two dollars per cord for cutting wood: *Held*, that testimony that defendant let contracts to other parties for one dollar and ninety cents per cord was inadmissible. *Id.*
7. ASSUMPTION OF FACTS NOT PROVEN.—A question which assumes a fact not proven in the case ought not to be asked. *Davis v. Cook*, 265.
8. CONTRACT—COUNTER CLAIM.—W. & R., in their answer, as a counter claim, allege a balance due upon the original contract, and a balance due for extra work: *Held*, that the refusal of the court to permit plaintiff to introduce proof of the existence and amount of the liens, was error; that such facts were admissible for the purpose of defeating the contractors' counter claim to the extent of the full amount of valid liens for labor and materials furnished to the contractors. *Truckee Lodge v. Wood*, 294.
9. *IDEM*—VALUE OF WHOLE BUILDING.—Against plaintiff's objection, the court allowed defendant to ask a witness: What is the reasonable value of the whole material and work done in the erection of that building as it now stands? *Held*, error to allow defendants to prove the value of any thing not done by W. & R., and then only as to extra work and materials. *Id.*
10. *IDEM*.—The court refused to allow plaintiff to prove the difference between the value of the building as completed, and as agreed to be completed: *Held*, not error. *Id.*
11. CLAIM AND DELIVERY OF PERSONAL PROPERTY—PLEADINGS—FRAUD.—S., as constable, levied an attachment upon certain goods as the property of Y. Plaintiffs thereafter brought suit against S. to recover the property. Y. was allowed to intervene. He alleged that plaintiffs, with the intent to defraud him and his creditors, had, upon certain false representations, induced him to execute a bill of sale to them: *Held*, upon a review of the facts, that under the pleadings it was proper to admit evidence as to the alleged fraudulent acts and intention of plaintiffs. *Ivancovich v. Stern*, 341.
12. ACTION AGAINST RAILROAD—NONSUIT.—Upon a review of the testimony: *Held*, that the court erred in granting a nonsuit. *Bunting v. C. P. R. R. Co.*, 352.
13. EVIDENCE SUFFICIENT TO SUSTAIN VERDICT.—Rule as to substantial conflict of evidence enforced. *Ivancovich v. Stern*, 342; *Cohen v. E. & P. R. R. Co.*, 377; *McLeod v. Lee*, 398.
14. EVIDENCE ADMITTED WITHOUT OBJECTION.—Parol evidence to establish a trust was admitted without objection: *Held*, that it was too late to raise the objection on appeal to this court, and that it must be considered and given its full value. *Dalton v Dalton*, 420.

15. SUFFICIENCY OF EVIDENCE TO ESTABLISH A TRUST.—Parol evidence to defeat a deed and establish a trust must be clear, and attended with no uncertainty, and even then should be received with great caution. *Id.*
16. *IDEM*—INSUFFICIENCY OF EVIDENCE TO SUPPORT FINDING.—*Held*, upon a review of all the facts, that the testimony was insufficient to support a finding, that plaintiff paid no consideration for the property in question, but held it in trust for defendant. *Id.*
- POSSESSION OF STOLEN PROPERTY. (See Criminal Law, 1.) 72.
- TESTIMONY SUFFICIENT TO SUSTAIN CONVICTION OF LARCENY. (See Criminal Law, 1.) 72.
- CERTIFICATE OF ACKNOWLEDGMENT — TESTIMONY OF NOTARY. (See Acknowledgment, 1, 2.) 77.
- CORPUS DELICTI MAY BE PROVEN BY CIRCUMSTANTIAL EVIDENCE. (See Criminal Law, 3, 4.) 80.
- BURDEN OF PROOF TO ESTABLISH FORFEITURE OF TOLL-ROAD FRANCHISE. (See Pleadings, 7.) 209.
- PLEA OF JUSTIFIABLE HOMICIDE. (See Criminal Law, 5.) 210.
- ADMISSIBILITY OF EVIDENCE TO ESTABLISH BREACH OF CONTRACT IN FORECLOSURE OF MECHANICS' LIENS. (See Contract, 2.) 293.
- CHANGE OF PLANS AND SPECIFICATIONS IN CONTRACT. (See Contract, 3.) 294.
- STATEMENT NOT CONTAINING ALL THE EVIDENCE. (See Statement, 6.) 321.
- ADMISSIBILITY OF EVIDENCE TO ESTABLISH FRAUD IN SALE OF PERSONAL PROPERTY. (See Sale, 1-4.) 324.
- WHEN PAROL EVIDENCE IS ADMISSIBLE TO VARY THE TERMS OF A WRITTEN CONTRACT. (See Contract, 4-6.) 373.
- WHEN QUESTION OF NEGLIGENCE, IN ACTIONS AGAINST RAILROAD COMPANY, SHOULD BE SUBMITTED TO THE JURY. (See Railroads, 2; Negligence, 1-5.) 377.
- OBJECTIONS TO EVIDENCE, WHEN SUFFICIENT. (See Objections, 1.) 453.

EXECUTION.

1. EXECUTION MUST FOLLOW JUDGMENT—INTEREST.—An execution must follow the judgment, and if the judgment does not call for interest, the execution can not. *Hastings v. Johnson*, 1 Nev. 617, affirmed; *Solen v. V. & T. R. R. Co.*, 405.

EXECUTOR.

- RIGHTS OF HEIRS, AS AGAINST EXECUTOR, TO MAINTAIN EJECTMENT SUIT. (See Estates of Deceased Persons, 1.) 153.

FEES.

TRANSFER OF CRIMINAL CASES.

1. ILLEGAL FEES.—The county from which the cause was transferred has the right to show that the services charged for were never rendered, or that the fees charged are unauthorized by the statute. *Washoe Co. v. Humboldt Co.*, 123.
2. FEES OF OFFICERS.—Officers can only demand such fees as the law has fixed and authorized for the performance of their official duties. *Id.*

3. **ATTORNEYS' FEES—CONSTRUCTION OF STATUTE.**—In construing the statute approved March 5, 1875 (Stat. 1875, 42), relative to attorneys' fees in criminal cases: *Held*, that an attorney who defends a prisoner under appointment by the court, is entitled to a fee not exceeding fifty dollars for each trial of the cause, in whatever county the case may be tried, and an additional fee, not exceeding fifty dollars, if the case is followed into the supreme court. *Id.*
 4. **ALLOWANCE OF FEES FOR SUMMONING JURY—WHEN PROPER.**—The county from which a criminal case is transferred is liable for the fees of the sheriff in summoning a jury upon a special venire for that particular case. *Id.* 124.
 5. **SHERIFFS' FEES—SUMMONING A JURY—MILEAGE.**—When a venire is issued to a sheriff for thirty jurors, and he finds only twenty-four: *Held*, that he was entitled to his fees "for miles actually traveled in attempting to find and serve jurors whose names appeared upon the venire, but who could not be found and served." *Id.*
 6. **IDEM—TAKING PRISONERS BEFORE COURT.**—The sheriff is not entitled to any compensation for bringing the defendant into court during the trial. *Id.*
 7. **IDEM—ATTENDANCE ON COURT.**—The sheriff is entitled to five dollars for each day's attendance. He can not charge extra for a night session. *Id.*
 8. **IDEM—SERVICE OF SUBPENA IN ANOTHER COUNTY.**—The sheriff is not authorized by the statute to serve a subpoena upon witnesses residing in any other county, except it is within the same judicial district. *Id.*
 9. **CLERKS' FEES—JURORS' CERTIFICATES.**—The clerk is not entitled to any fees from the county, for issuing time checks or certificates to each individual juror. *Id.*
 10. **IDEM—MOTIONS AND ORDERS.**—The clerk is only entitled to charge for such motions and orders as are properly entered in the records of the court. *Id.*
 11. **JURORS' FEES—ATTENDANCE FIRST DAY.**—The county from which a criminal cause is transferred is properly chargeable for one day's attendance of each juror present on the first day of the trial of the case. *Id.*
 12. **REPORTER'S FEES.**—Where the court is authorized to appoint a shorthand reporter, and there is no statute regulating his fees, he is entitled to a reasonable compensation for his services. *Id.*
 13. **SURVEYORS' FEES.**—Where it is necessary to have a survey of the premises where the crime was committed, in order to properly present the case to the jury, the county commissioners are authorized to allow a reasonable compensation for such survey. *Id.*
- IRREGULARITY IN PAYMENT OF FEES IN CRIMINAL CASES TRANSFERRED FROM ANOTHER COUNTY.** (See Claims, 1.) 123.
- CONTRACT FOR SHERIFF'S FEES.** (See Sheriffs, 1.) 148.
- AGREEMENT TO DIVIDE FEES OF AN OFFICE IS VOID AS AGAINST PUBLIC POLICY.** (See Contracts, 1.) 175.

FINDINGS.

- NOTICE OF FILING.** (See New Trial, 1.) 24.
- FINDINGS SUSTAINED BY THE EVIDENCE.** (See Evidence, 3.) 161.

CONFLICT OF EVIDENCE. (See Evidence, 4.) 170.

INSUFFICIENCY OF EVIDENCE TO SUPPORT FINDINGS. (See Evidence, 16,) 420.

FORECLOSURE.

RIGHTS OF INTERVENORS IN FORECLOSURE OF MECHANICS' LIENS. (See Mechanics' Liens, 3.) 24.

FORFEITURE.

BURDEN OF PROOF TO ESTABLISH FORFEITURE OF TOLL ROAD FRANCHISE. (See Pleadings, 7.) 209.

FRANCHISE.

BURDEN OF PROOF TO ESTABLISH FORFEITURE OF TOLL ROAD FRANCHISE. (See Pleadings, 7.) 209.

FRAUD.

ADMISSIBILITY OF EVIDENCE TO ESTABLISH FRAUD IN SALE OF PERSONAL PROPERTY. (See Sale, 1-4.) 324.

SUFFICIENCY OF PLEADING IN ACTION OF CLAIM AND DELIVERY TO ADMIT EVIDENCE OF FRAUD. (See Evidence, 11.) 341.

SALE OF PERSONAL PROPERTY, WHEN FRAUDULENT. (See Sale, 5, 6.) 342.

FRAUDULENT REPRESENTATIONS.

SALE OF PERSONAL PROPERTY, WHEN FRAUDULENT. (See Sale, 7.) 342.

WHEN EQUITY WILL RELIEVE A PERSON WHO HAS BEEN DECEIVED. (See Equity, 1.) 419.

HABEAS CORPUS.

REASONABLE OR PROBABLE CAUSE FOR COMMITMENT. (See Commitment, 1.) 451.

HEIRS.

RIGHT OF HEIRS TO MAINTAIN EJECTMENT. (See Estates of Deceased Persons, 1.) 153.

HOMICIDE.

PLEA OF JUSTIFIABLE HOMICIDE. (See Criminal Law, 5.) 210.

IDENTITY.

EXHIBITION OF TATTOO MARKS UPON THE PERSON TO IDENTIFY THE PRISONER. (See Criminal Law, 2.) 79.

INDICTMENT.

1. INDICTMENT—COUNTS SETTING OUT OFFENSE IN DIFFERENT FORMS.—If the offense is set forth in different counts, it must be done in such a way as to show clearly upon the face of the indictment that the matters and facts set forth in the different counts are descriptive of one and the same transaction. *State v. Malime*, 288.

EMBEZZLEMENT.—An indictment for embezzlement contained two counts each identical as to the time, place, names of persons and description of property. *Held*, that the indictment charged but one offense.

INJUNCTION.

1. **INJUNCTION—EASEMENT—DRAINAGE.**—The owner of upper land, who has for more than five years enjoyed the privilege of running the waste water used from artificial sources for the purpose of irrigating his land, does not acquire an easement to run the same over the lower lands in such unreasonable or unnatural quantities as to damage the property of such lower land owners, and an injunction will issue to prevent such injury, although the parties enjoined are not jointly liable for the damages. *Blaisdell v. Stephens*, 17.

INSTRUCTION.

1. **INSTRUCTIONS—RIGHT OF COURT TO MODIFY.**—A court is not bound to give instructions in the exact language asked for by counsel; but may add to, or change, the phraseology in order to make them clear and explicit, or to prevent the jury from being misled. *State v. Davis*, 407.
2. **IDEM.—WHEN SHOULD BE EXPLICIT.**—If a defendant desires explicit instructions to be given upon any point, it is his right and duty to prepare the same and ask the court to give them. *Id.*

PLEA OF JUSTIFIABLE HOMICIDE. (See Criminal Law, 6.) 210.

POSSESSION OF PERSONAL PROPERTY. (See Possession, 1.) 265.

WHEN ERRONEOUS INSTRUCTIONS ARE NOT SUFFICIENT TO REVERSE A CORRECT JUDGMENT. (See Judgment, 3.) 294.

SALE OF PERSONAL PROPERTY TO HINDER CREDITORS. (See Sale, 8.) 242.

INSTRUCTION AS TO REASONABLE CARE. (See Railroad, 4.) 377.

WHAT MAY BE CONSIDERED IN ASSESSING DAMAGES IN ACTION AGAINST RAILROAD COMPANY. (See Damages, 1.) 377.

RIGHTS AND DUTIES OF TRAVELER AND RAILROAD COMPANY EQUAL. (See Railroads, 5.) 377.

SPEED OF RAILROAD TRAIN. (See Railroads, 6.) 377.

IF A PARTY DESIRES EXPLICIT INSTRUCTIONS, THEY MUST BE ASKED FOR. (See Criminal Law, 10.) 440.

INSOLVENT DEBTOR.

LIEN OF ATTACHMENT. (See Attachment, 1.) 416.

INTENT.

INTENT OF LEGISLATURE IN CONSTRUING STATUTE. (See Statute, 9, 10.) 365.

INTENT OF DEFENDANT IN MAKING ASSAULT WITH DEADLY WEAPON. (See Assault, 1.) 407.

INTEREST.

EXECUTION MUST FOLLOW JUDGMENT. (See Execution, 1.) 405.

INTERPLEADER.

WHAT CONSTITUTES BILL OF INTERPLEADER. (See Pleadings, 1.) 53.

INTERVENTION.

RIGHTS OF INTERVENORS. (See Mechanics' Liens, 3.) 24.

JAIL.

BAD CONDITION OF COUNTY JAIL NO EXCUSE FOR PRISONER ESCAPING THEREFROM. (See Criminal Law, 7, 8, 9.) 439.

JOINT LIABILITY.

JOINT LIABILITY—WHEN DOES NOT EXIST.—Where two or more parties act each for himself, in producing a result injurious to plaintiff, they can not be held jointly liable for the acts of each other. *Blaisdell v. Stephens*, 17.

JUDGE.

TRANSCRIBING TESTIMONY FOR THE GOVERNOR. (See Statute, 2.) 66.

ART. VI., SEC. 5, OF THE CONSTITUTION, RELATING TO DISTRICT JUDGES, CONSTRUED. (See Constitution. 1.) 117.

STATUTES 1866, 140, SEC. 1, RELATING TO JUDGES, CONSTRUED. (See Statute, 3.) 117.

JUDGMENT.

1. JUDGMENT MUST CORRESPOND WITH PLEADINGS.—A judgment must accord with and be warranted by the pleadings of the party in whose favor it is rendered. *Frevort v. Henry*, 191.
2. IDEM—JUDGMENT-ROLL.—An objection that the judgment is not authorized by the pleadings may be taken upon the judgment-roll alone. *Id.*
3. JUDGMENT CORRECT—ERRONEOUS INSTRUCTIONS.—A judgment will not be reversed for any error in the instructions when it is apparent that the verdict would have been the same with correct instructions, and when the court below could not have refused to grant a new trial had the verdict been for the opposite party. *Truckee Lodge v. Wood*, 294.

JUDGMENT ON PLEADINGS. (See Pleadings, 3, 4.) 53.

AMENDMENT OF JUDGMENT AFTER ADJOURNMENT OF TERM. (See Amendment, 1.) 63.

APPEAL FROM PART OF THE JUDGMENT. (See Appeal, 2.) 161.

SECTION 583 CIVIL PRACTICE ACT CONSTRUED—MANDAMUS. (See Mandamus, 1.) 336.

JUDGMENT AFFIRMED, WHEN APPELLANT FAILS TO APPEAR. (See Appeal, 4.) 397.

EXECUTION MUST FOLLOW JUDGMENT AS TO INTEREST. (See Execution, 1.) 405.

JURISDICTION.

VIOLATION OF TOWN ORDINANCE—CRIMINAL CAUSE—JURISDICTION.—The trial of a party charged with violation of a town ordinance is a criminal case. The charge does not amount to a felony, and this court has no jurisdiction in such a case. *Town of Gold Hill v. Brisacher*, 52.

JURISDICTION OF BOARD OF EQUALIZATION TO RAISE ASSESSMENT. (See Certiorari, 5; Board of Equalization, 1, 2.) 140.

APPEAL FROM PART OF THE JUDGMENT. (See Appeal, 2.) 161.

JURISDICTION OF SUPREME COURT IN CRIMINAL CAUSES CONFINED TO CASES OF FELONY. (See Constitution, 3.) 348.

JUSTICES OF THE PEACE HAVE JURISDICTION OF ACTIONS AGAINST COUNTY WHERE THE AMOUNT IS LESS THAN THREE HUNDRED DOLLARS. (See Justice of the Peace, 1.) 431.

JURY.

1. COMPETENCY OF JUROR—EXHIBITION OF NEWSPAPER ARTICLE—REFRESHING MEMORY.—A juror testified that he had read in the *Carson Appeal* what purported to be a true account of the difficulty. Defendant's attorney asked him whether, if his memory was refreshed by "an exhibition of a newspaper article purporting to give an account of the transaction in question, he could answer whether he had formed an unqualified opinion touching the matter in issue." *Held*, that this question was properly excluded, because it was not limited to the particular article the juror had read. *State v. Davis*, 407.

2. COMPETENCY OF JUROR—HYPOTHETICAL QUESTIONS IRRELEVANT.—Defendant's counsel asked a juror: "If the prosecution in this case should claim, and a court should hold, that a man confined in jail under a charge of felony, leaving the jail, the doors being open, without force, is guilty of an escape under the law, then have you formed an unqualified opinion concerning the guilt or innocence of the defendant?" *Held*, that the question was properly excluded. *Id.* 440.

3. IDEM—CHALLENGE PRACTICE.—The proper practice is to dispose of each challenge in the order named in the statute. If there is no challenge to the panel, or if it is made and overruled, questions appertaining alone to general disqualification should then be asked, and a challenge for that cause interposed or waived; next, questions competent in view of a challenge for implied bias only should be propounded, and a challenge for that cause interposed or waived; and last, the same cause should be pursued for actual bias. *Id.*

4. IDEM—IMPLIED BIAS—DEFENDANT'S CHARACTER.—The fact that a juror had formed an unfavorable opinion of defendant's character will not sustain a challenge for implied bias. *Id.*

SHERIFF'S FEES FOR SUMMONING JURY. (See Fees, 4, 5.) 124.

CLERK'S FEES FOR JURORS' CERTIFICATES. (See Fees, 9.) 124.

JUSTICE OF THE PEACE

1. JUSTICE OF THE PEACE—JURISDICTION—ACTION AGAINST COUNTY.—A justice of the peace has jurisdiction of an action against a county for a sum less than three hundred dollars. *Floral Springs W. Co. v. Rives*, 431.

LARCENY.

1. LARCENY—LOST PROPERTY FOUND IN THE HIGHWAY.—When property is found in the highway, and the finder knows the owner, or there are any
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marks upon it by which the owner may be ascertained, and the finder instead of restoring it converts it to his own use, such conversion will constitute a felonious taking. *State v. Clifford*, 72.

2. **IDEM—FELONIOUS INTENT.**—If there be a felonious intent to appropriate the property coupled with a reasonable belief that the owner could be found, it would be larceny. *Id.*
3. **IDEM—SUBSEQUENT FELONIOUS INTENT NOT SUFFICIENT.**—If the finder takes possession of the property without intending to steal it at the time of the original taking, he can not be found guilty of larceny by any subsequent intention to convert it to his own use. *Id.*

TESTIMONY SUFFICIENT TO SUSTAIN CONVICTION. (See Criminal Law, 1.) 72.

LEGISLATURE.

INTENT OF LEGISLATURE IN CONSTRUING STATUTES. (See Statutes, 9, 10.) 365.

LICENSE.

1. **CITY LICENSE AND COUNTY LICENSE MAY BE REQUIRED FOR THE SAME BUSINESS.**—The city of Virginia, under its charter, may require a license for carrying on any trade, business, or profession, although an act of the legislature also requires a license to be taken out for carrying on the same trade, business, or profession within the county, and can enforce a penalty in case of a refusal to take out such license. *Ex parte Siebenhauer*, 365.
2. **ORDINANCE OF VIRGINIA CITY—LICENSE TAX VALID.**—*Held*, that the ordinance of Virginia City, requiring a license tax, does not discriminate against, or in favor of, any class of citizens. *Id.*
3. **TRAVELING MERCHANT REQUIRED TO PAY A LICENSE AS A MERCHANT.**—Petitioner kept a stock of goods in San Francisco, California, and comes to Virginia City, Nevada, for the purpose for soliciting orders for goods: *Held*, that the city of Virginia was authorized to impose and collect a license tax from him as a merchant. (Beatty, C. J., and Leonard, J.) *Id.*

LICENSE TAX, MEANING OF WORD "SOLICITOR." (See Statute, 11.) 365.

LIEN.

See MECHANICS' LIENS.

ATTACHMENT LIEN—INSOLVENT DEBTORS' ACT. (See Attachment, 1.) 416.

LIMITATIONS.

STATUTE APPLIES TO SUITS FOR TAXES. (See Taxes, 1, 2.) 220.

MANDAMUS.

1. **MANDAMUS—SECTION 583 CIVIL PRACTICE ACT CONSTRUED—APPEAL—REMEDY AT LAW.**—Petitioner applied by motion under section 583, Civil

Practice Act (1 C. L. 1644), to the district court for an order requiring the justice of the peace before whom this cause was tried, to transmit to the district court the papers on appeal. The order was refused. Petitioner thereafter, upon the same state of facts, applied to this court for a writ of mandamus to compel the justice to transmit said papers to the district court: *Held*, that the order of the district court denying petitioner's motion was a final judgment in that proceeding, from which an appeal lies. (Beatty, C. J., dissenting.) *Mayberry v. Bowker*, 336.

2. *IDEM*.—The writ of mandamus will not be issued in any case where petitioner has a plain, speedy, and adequate remedy at law. *Id.*
3. **MANDAMUS—WILL BE ISSUED TO COMPEL COURTS TO TRY CAUSES.**—If the district court refuses to try a cause on the ground that it has no jurisdiction, and it appears that the court has jurisdiction, the writ of mandate will be issued to compel the court to hear and decide the cause upon its merits. *Floral Springs W. Co. v. Rives*, 431.

MECHANICS' LIEN.

1. **MECHANICS' LIEN LAW—LIBERALLY CONSTRUED.**—The lien law is to be liberally construed. A substantial compliance with its provisions is all that is required. (*Skyrme v. Occidental M. & M. Co.*, 8 Nev. 219, affirmed.) *Hunter v. Truckee Lodge*, 24.
 2. *IDEM*.—**TIME FOR FILING NOTICE.**—The lien claimant is only required by the statute to file his notice before the expiration of thirty days after the completion of the building. *Id.*
 3. *IDEM*.—**FORECLOSURE—RIGHTS OF INTERVENORS.**—Intervenors are connected with the proceeding to foreclose plaintiffs' lien, by force of the statute, when the action is commenced and notice thereof is published. The liens may be proved without any formal intervention. *Id.*
 4. *IDEM*.—**ALTERATION OF RECORD—DESCRIPTION OF PREMISES.**—M. and D. filed a notice of lien and described the premises as being in lot 9 in a certain block. After the notice was recorded, but before the time had elapsed for filing, they were permitted to change the number of the lot in the notice and upon the record: *Held*, it appearing that no fraud was intended, and the notice otherwise containing a good description of the premises, that such alteration did not affect the validity of the notice. *Id.*
 5. **PAYMENTS TO CONTRACTOR—MUST BE PLEADED BY DEFENDANT.**—Before the defendant can avail himself of the fact, if it be a defense, that he had paid all that he agreed to pay, before notice of the claims of third parties, he must allege and prove the fact. *Id.*
 6. *IDEM*.—**NOT A DEFENSE—RIGHTS OF SUB-CONTRACTORS.**—In construing the lien law (Stat. 1875, 122), the court, upon rehearing, *held*, that the legislature intended to give sub-contractors and material-men direct liens upon the premises for the value of their labor and materials, regardless of payments on the principal contract made prior to the time within which the law requires notice of their claims to be recorded. *Id.*
- ADMISSIBILITY OF EVIDENCE IN BREACH OF CONTRACT WHERE DAMAGES ARE NOMINAL.** (See *Contract*, 2.) 293.

PROOF OF EXISTENCE OF MECHANICS' LIENS—BREACH OF CONTRACT. (See Evidence, 8.) 294.

MINING CLAIMS.

PLEADINGS IN SUITS FOR TAXES ON PROCEEDS OF MINES. (See Taxes, 1-6.) 220.

STATUTE TO PROTECT RIGHTS OF STOCKHOLDERS IN MINES, CONSTRUED. (See Statute, 5.) 311.

WHEN TRUE OWNER IS ESTOPPED FROM ASSERTING TITLE TO MINING STOCKS. (See Stocks, 1.) 362.

MILITIA ROLL.

1. MILITIA ROLL—EXPENSES OF, HOW PAID.—In construing the provisions of the statute: *Held*, that the bills of county assessors for making the militia roll must be passed upon by the state board of military auditors and paid out of the militia fund of the state. *State ex rel. Hobart v. Ryland*, 46.

MISTAKE.

1. SUFFICIENCY OF SHERIFF'S RETURN—CLERICAL MISTAKE.—Where the sheriff made return that he personally served the summons upon James Mayberry, and further certified that he "delivered to the said James May a certified copy of the complaint," etc.: *Held*, that the word "said" preceding the words "James May," shows that they were written by mistake for James Mayberry, and that the return is sufficient. *Allen v. Mayberry*, 115.

MOTION.

TIME TO MOVE FOR A NEW TRIAL. (See New Trial, 1.) 24.

NEGLIGENCE.

1. ACTION AGAINST RAILROAD COMPANY—NEGLIGENCE—QUESTION OF LAW. If a party, knowingly about to cross a railroad track at a regular crossing on a public street of a town, can have an unobstructed view of the railroad, so as to know of the approach of a train a sufficient time to clearly avoid any injury from it, and he fails to use his ordinary faculties, and an injury occurs, he can not, as a matter of law, recover. *Bunting v. C. P. R. R. Co.*, 351.
2. IDEM—NEGLIGENCE—QUESTION OF FACT.—If the view of the railroad is so obstructed by the act of the railroad company as to render it difficult to learn of the approach of a train, or there are other circumstances calculated to deceive a party approaching the track, such party has the right to presume that the usual and proper signals will be given by the railroad company; and if not given, then the question whether it was negligence on his part, is a question of fact for the jury to determine. *Id.*

3. **IDEM—SUDDEN DANGER.**—Where a party suddenly finds himself in great peril, the law does not demand the exercise of the soundest discretion, without regard to the surrounding circumstances. *Id.*
4. **WHEN QUESTION OF NEGLIGENCE SHOULD BE SUBMITTED TO A JURY.**—Whenever the question whether plaintiff was guilty of contributory negligence, whether he exercised ordinary and reasonable care, is dependent upon a state of facts, in regard to which reasonable men might honestly differ, the question should be submitted to the jury. *Id.* 352.
5. **IDEM—CONTRIBUTORY NEGLIGENCE.**—The testimony upon the part of the defendant tended to show that if the plaintiff, or any of his companions, had looked and listened, they could have seen and heard the approaching train in time to have avoided the accident: *Held*, upon a review of all the testimony, that the question whether or not plaintiff was guilty of contributory negligence, was properly submitted to the jury as a question of fact. *Cohen v. E. & P. R. R. Co.*, 377.

INSTRUCTION AS TO REASONABLE CARE. (See Railroad, 4.) 377.

NEW TRIAL.

1. **MOTION FOR NEW TRIAL—WAIVER OF NOTICE—TIME TO MOVE FOR NEW TRIAL.**—Service of a statement on appeal is a waiver of written notice of the filing of findings of the court, and in such a case a notice of intention to move for a new trial must be filed within ten days after the service of statement. (*Corbett v. Swift*, 6 Nev. 194, affirmed.) *Hunter v. Truckee Lodge*, 24.
2. **NEW TRIAL—WHEN SHOULD NOT BE GRANTED.**—A new trial ought not to be granted on a motion to set aside a verdict, merely because the court had erred in finding a fact in some preliminary proceeding in the case. *Solomon v. Fuller*, 63.
3. **NEW TRIAL, WHEN COURT CHANGES ITS RULING.**—If the court makes a ruling during the progress of the trial, the party in whose favor the ruling is made, is entitled to have the case decided according to the ruling in all cases, where if the ruling had been against him, he might have been able to remove the objections made by the other party. *Jeffree v. Walsh*, 143.
4. **ORDER GRANTING NEW TRIAL—WHEN IT WILL BE SUSTAINED.**—Where, on appeal from an order granting a new trial, the record shows that the motion was made upon two grounds, without showing upon which of them the action was based, the order will be affirmed, if the action of the court can be sustained upon either ground. *McLeod v. Lee*, 398.
5. **IDEM—CONFLICT OF EVIDENCE.**—If a new trial is granted upon the ground that the evidence is insufficient to sustain the verdict, the action of the court will be sustained by the appellate court, if there is a substantial conflict in the evidence. *Id.*

STATEMENT MUST BE FILED IN TIME. (See Statement, 3.) 263.

NONSUIT.

QUESTION OF NEGLIGENCE WHEN QUESTION OF FACT. (See Negligence, 1-4.) 351.

NOTARY PUBLIC.

TESTIMONY OF NOTARY—CERTIFICATE OF ACKNOWLEDGMENT. (See Acknowledgment, 1, 2.) 77.

NOTES.

See BILLS AND NOTES.

NOTICE.

WAIVER OF NOTICE. (See New Trial, 1.) 24.

TIME OF FILING NOTICE. (See Mechanics' Liens, 2.) 24.

NOTICE BY SURETY. (See Sureties, 2.) 215.

OBJECTIONS.

GENERAL OBJECTION TO EVIDENCE—WHEN SUFFICIENT.—Where the evidence offered is wholly incompetent and inadmissible for any purpose, a general objection on the ground of incompetency is sufficient. *State v. Soule*, 453.

JUDGMENT NOT AUTHORIZED BY PLEADINGS. (See Judgment, 1.) 191.

OBJECTIONS TO STATEMENT WHEN WAIVED. (See Statement, 4.) 293.

EVIDENCE ADMITTED WITHOUT OBJECTION. (See Evidence, 14.) 420.

OFFICE AND OFFICER.

SUFFICIENCY OF SHERIFF'S RETURN. (See Mistake, 1.) 115.

FEES OF OFFICERS. (See Fees, 2-12.) 123.

SUITS UPON OFFICIAL BONDS. (See Pleadings, 5.) 143.

AGREEMENT TO DIVIDE FEES OF OFFICE VOID. (See Contracts, 1.) 175.

ORDINANCE.

VIOLATION OF TOWN ORDINANCE—CRIMINAL CAUSE. (See Jurisdiction, 1.) 52.

LICENSE TAX UNDER ORDINANCE OF VIRGINIA CITY VALID. (See License, 1-3.) 365.

PAROL EVIDENCE.

WHEN PAROL EVIDENCE IS ADMISSIBLE TO VARY THE TERMS OF A WRITTEN CONTRACT. (See Contract, 4-6.) 373.

PAROL EVIDENCE TO ESTABLISH A TRUST MUST BE CLEAR, POSITIVE, AND CERTAIN. (See Evidence, 15.) 420.

PARTIES.

MUTUALITY OF PARTIES TO A CONTRACT. (See Contract, 4-6.) 373.

PARTNERSHIP.

1. **PARTNERSHIP—PROMISSORY NOTES—PRESUMPTION.**—Where the notes are given in the firm name, the legal presumption is that they were executed for a partnership purpose, and the burden of proof is upon defendants to establish the contrary. *Davis v. Cook*, 265.
 2. **REAL ESTATE—PURCHASE OF BY ONE PARTNER.**—The purchase of real estate may or may not be within the scope of the partnership business. *Id.*
 3. **IDEM—SCOPE OF PARTNERSHIP BUSINESS.**—Lewis, John A., and Isaac Cook were copartners engaged in the business of general merchandising, under the firm name of "Cook Bros." Lewis was the resident partner. John A. and Isaac were non-residents. Lewis Cook purchased a stone storehouse and a lot of stationery, in his individual name, and in payment therefor gave the notes, sued upon in this action, in the firm name: *Held*, in reviewing all the testimony, that Lewis Cook, in making this purchase, acted within the scope of the partnership business, and that the knowledge of such purchase was not sufficient to put the plaintiff upon inquiry as to the consent of the other partners. *Id.*
- POSSESSION OF PERSONAL PROPERTY.** (See Possession, 1.) 265.

PAYMENT.

- PAYMENTS TO CONTRACTOR.** (See Mechanics' Liens, 5.) 25.
- PAYMENT OF CLAIMS WHERE CRIMINAL CAUSE IS TRANSFERRED.** (See Claims, 1.) 123.
- PAYMENT OF NOTE BY SURETY.** (See Sureties, 1.) 191.
- PAYMENT OF REWARDS.** (See Statute, 7, 8.) 332.

PERSONAL PROPERTY.

- POSSESSION OF PERSONAL PROPERTY.** (See Possession, 1.) 265.
- SALE OF PERSONAL PROPERTY TO DEFAUD CREDITORS.** (See Sale, 1-4.) 324.
- PLEADINGS SUFFICIENT TO ADMIT EVIDENCE OF FRAUD IN CLAIM AND DELIVERY OF PERSONAL PROPERTY.** (See Evidence, 11.) 341.
- SALE OF PERSONAL PROPERTY, WHEN FRAUDULENT.** (See Sale, 5, 6.) 342.

PLEADINGS.

1. **BILL OF INTERPLEADER—WHAT CONSTITUTES.**—In a bill of interpleader, it must be shown that two or more persons have a claim against the plaintiff; that they claim the same property; that the plaintiff has no beneficial interest in the property, and can not safely determine to which of the defendants it belongs. *Orr Water Ditch Co. v. Larcombe*, 53.
2. **BILL IN THE NATURE OF AN INTERPLEADER** is distinguished from a bill of interpleader proper in this, that the complainant may seek some relief against the respective claimants to the property. *Id.*

3. JUDGMENT ON PLEADINGS—WHEN ERRONEOUS.—In construing the pleadings: *Held*, that the court erred in rendering a decree in favor of defendant, Larcombe, for one hundred inches of water, without allowing the plaintiffs to introduce evidence, if it could, that Larcombe was not entitled to any more than thirty-five inches. *Id.*
 4. IDEM.—Where one of the defendants answered, and disclaimed having any interest in the property: *Held*, that the court erred in rendering a judgment, upon the pleadings, in his favor for costs. Plaintiff had the right to show, if it could, that his disclaimer was untrue. *Id.*
 5. SURETIES—OFFICIAL BOND—PLEADING.—In an action brought against the sureties on the official bond of the public administrator, the complaint will be defective if there is no allegation that the defendants executed the bond. *Jeffree v. Walsh*, 143.
 6. AMENDMENT TO PLEADINGS.—If evidence is objected to because the pleadings are defective, the court should allow the pleadings to be amended. *Id.* 144.
 7. QUO WARRANTO—TOLL ROAD FRANCHISE—ABANDONMENT—BURDEN OF PROOF.—When the pleadings admit that the parties owning a toll-road franchise have a good title, and the proceeding to have the franchise forfeited is based solely upon a claim of abandonment or forfeiture, the affirmative of the issue and the burden of proof is on the state. *State v. Haskell*, 209.
- PAYMENTS TO CONTRACTOR MUST BE PLEADED BY DEFENDANT. (See Mechanics' Liens, 5.) 25.
- JUDGMENT MUST CORRESPOND WITH PLEADINGS. (See Judgment, 1.) 191.
- MISJOINDER OF CAUSES OF ACTION IN TAX SUITS. (See Taxes, 5.) 220.
- BREACH OF CONTRACT—EXISTENCE OF MECHANICS' LIENS. (See Evidence, 8.) 294.
- SUFFICIENCY OF COMPLAINT IN ELECTION CONTEST. (See Election, 1.) 320.
- CLAIM AND DELIVERY OF PERSONAL PROPERTY—PLEADINGS SUFFICIENT TO ADMIT EVIDENCE OF FRAUD. (See Evidence, 11.) 341.

POSSESSION.

1. POSSESSION OF PERSONAL PROPERTY—VERITY OF DEED—INSTRUCTION.—The following instruction, viz.: "Possession of personal property is *prima facie* evidence of ownership, and a deed on its face imports verity, and no subsequent change of possession shows, or tends to show, that a party in possession first was not the owner at that time:" *Held*, erroneous. *Davis v. Cook*, 265.
- POSSESSION OF PURCHASER PRIOR TO DEED. (See Evidence, 1.) 60.
- POSSESSION OF STOLEN PROPERTY. (See Criminal Law, 1.) 72.
- SALE AND DELIVERY OF PERSONAL PROPERTY—EMPLOYMENT OF CLERK OF VENDOR. (See Sale, 8.) 342.

PRACTICE.

- CHALLENGING JURORS. (See Jury, 3.) 440.

PRACTICE ACT.

APPLIES TO SUITS FOR COLLECTION OF TAXES. (See Taxes, 3, 4.)

PROVISIONS CITED.

- Sections 37-40. Form of pleading in civil actions, 238.
- Section 50. Issuance of attachment on Sunday, 437.
- Section 64. Applicable to tax suits, 237-9.
- Section 68. Default, 174.
- Section 189. Judgment entered by referee, 332.
- Section 332. Service statement on appeal, 333.
- Section 437. Certiorari, 69.
- Sections 507, 583. Transmission of appeal papers from justices to district court, 336, 341.

PRELIMINARY EXAMINATION.

1. PRELIMINARY EXAMINATION—WAIVER OF STATUTORY RIGHT.—Defendant objected to proceeding with the trial because the testimony given at his preliminary examination had not been reduced to writing, as required by the statute. *Held*, that he could not avail himself of this irregularity without an affirmative showing that he was deprived of this statutory right without his consent. *State v. Davis*, 407.
2. IDEM—CONTINUANCE.—Some of the witnesses who testified at the preliminary examination were absent from the state. There was no showing made that their testimony was material, or that any effort had been made to procure their attendance. *Held*, that the court did not err in proceeding with the trial. *Id*.

STATEMENT OF ONE DEFENDANT, WHEN INADMISSIBLE AGAINST HIS CO-DEFENDANT. (See Criminal Law, 11.) 453.

PRESCRIPTION.

1. TITLE BY PRESCRIPTION.—Defendants used water from a certain stream for more than five years prior to the commencement of this action; plaintiffs had been using water from the same stream for a longer period. It did not appear that the use by defendants was adverse to the claims of plaintiffs for more than one or two years immediately prior to the commencement of this suit: *Held*, that defendants could not claim any title to the water by prescription. *Dick v. Bird*, 161; *Dick v. Caldwell*, 167.

PRESUMPTION.

CONSTRUCTION OF STATUTE ADOPTED FROM ANOTHER STATE. (See Statute, 1.) 25.

NOTES GIVEN IN PARTNERSHIP NAME. (See Partnership, 1.) 265.

STATEMENT NOT CONTAINING ALL THE EVIDENCE. (See Statement, 6.) 321.

QUESTION OF LAW AND FACT.

NEGLECTANCE, WHEN A QUESTION OF LAW OR FACT. (See Negligence, 1-4; Railroads, 2.) 351, 376.

CHARACTER OF WEAPON, WHETHER DEADLY OR NOT. (See Deadly Weapon, 1.) 407.

QUO WARRANTO.

BURDEN OF PROOF TO ESTABLISH FORFEITURE OF TOLL ROAD FRANCHISE. (See Pleadings, 7.) 209.

SUFFICIENCY OF COMPLAINT IN ELECTION CONTEST. (See Election, 1.) 320.

RAILROADS.

1. ACTION AGAINST RAILROAD COMPANY—CONTRIBUTORY NEGLIGENCE—DAMAGES.—Where it affirmatively appears that plaintiff was careless, and that his negligence proximately contributed in producing the injury complained of, he is not entitled to recover any damages. *Bunting v. C. P. R. R. Co.*, 351.
2. IDEM—NONSUIT—WHEN SHOULD NOT BE GRANTED—QUESTIONS OF FACT.—Plaintiff and his companions were strangers in Eureka, and ignorant of the existence of the defendant's railroad. At the close of the plaintiff's case, there was no evidence to show that plaintiff could have seen the train, as it approached the crossing, in season to avoid the accident, except that other people in different localities, near where the collision occurred, heard and saw the approaching train in time to have avoided the accident: *Held*, that a nonsuit was properly refused. *Cohen v. E. & P. R. R. Co.*, 376.
3. IDEM—RIGHTS OF STRANGERS.—The fact that plaintiff and his companions were strangers in Eureka, and did not know they were approaching a railroad crossing, was an important fact to be considered by the jury. *Id.*
4. REASONABLE CARE—NEGLECTANCE.—At the request of plaintiff, the court gave the following instruction to the jury: "No. 4. You are instructed that if you believe, from the evidence, that the plaintiff, at or about the time set forth in the complaint, was traveling upon the road which is crossed by the track of the defendant, and was exercising reasonable care for his own safety, and in attempting to cross the railroad track of the defendant, the wagon upon which the plaintiff was riding was overturned by the cars of the defendant; and that, at the time that said accident occurred, the said defendant was operating their said cars and locomotive in a negligent manner, or neglected to ring the bell, or blow the whistle, or otherwise signal their approach, and by reason of such neglect the plaintiff was injured, you will find a verdict for the plaintiff." *Held*, correct. *Id.* 377.
5. RIGHTS AND DUTIES OF TRAVELER AND OF RAILROAD COMPANY—EQUAL.—The court instructed the jury, "That where a railroad is crossed by any street, road, or public highway, the rights of the traveling public and the railroad company to the use of said crossing are equal, and both

parties are bound to use ordinary care, the one to avoid committing, and the other to avoid receiving, an injury:" *Held*, correct. *Id.*

6. *IDEM*—SPEED OF THE TRAIN.—The court instructed the jury, that it is the duty of the employes of a railroad company "to approach the crossing at such rate of speed as would enable them to check the train, if necessary:" *Held*, erroneous. *Id.*

WHAT MAY BE CONSIDERED IN ASSESSING DAMAGES IN ACTIONS AGAINST RAILROAD COMPANY. (See *Damages*, 1.) 377.

WHEN QUESTION OF NEGLIGENCE SHOULD BE SUBMITTED TO THE JURY. (See *Negligence*, 1-5.) 377.

REAL ESTATE.

WHEN PURCHASE OF, MAY BE WITHIN SCOPE OF PARTNERSHIP BUSINESS. (See *Partnership*, 2, 3.) 265.

REMARKS OF COURT.

WHEN IMPROPER. (See *Criminal Law*, 6.) 210.

REPEAL.

REPEAL OF UNCONSTITUTIONAL ACT. (See *Statutes*, 4.) 204.

REPORTER.

REPORTERS' FEES. (See *Fees*, 9.) 124.

REVENUE LAW.

STATUTE OF LIMITATIONS APPLIES TO TAX SUITS. (See *Taxes*, 1, 2.) 220.

REWARD.

PAYMENT OF REWARDS. (See *Statute*, 7.) 332.

ROADS, HIGHWAYS, AND BRIDGES.

BURDEN OF PROOF TO ESTABLISH FORFEITURE OF TOLL ROAD FRANCHISE. (See *Pleadings*, 7.) 209.

SALE AND DELIVERY.

1. SALE OF PERSONAL PROPERTY MADE TO HINDER, DELAY, AND DEFRAUD CREDITORS—FRAUDULENT GRANTORS CAN NOT RELY UPON THEIR OWN FRAUD.—M. and T., being indebted to divers persons, made, executed, and delivered to B. a bill of sale of certain personal property, for the purpose of hindering, delaying, and defrauding their creditors, and thereafter allowed B. to have an equivocal possession of the property and to hold himself out to the world as the true owner. E., a creditor of B.,

levied upon the property: *Held*, that the original transfer of the property to B., though fraudulent as to the creditors of M. and T., was valid between M. and T. and B.; that the bill of sale vested the legal title in B., and that the property was thereafter liable to be seized as his property at the instance of his creditors; and that M. and T. could not set up their own fraud in order to defeat the rights of such creditors. *Maher v. Swift*, 324.

2. **IDEM—SURRENDER OF BILL OF SALE.**—The bill of sale was surrendered, and the property delivered by B. to M. and T. prior to the levy by E.: *Held*, that such surrender and delivery did not defeat E.'s rights as a creditor of B. Such surrender and delivery having been made without any valid consideration. *Id.*
3. **IDEM.—ADMISSIBILITY OF EVIDENCE.**—The court excluded a sworn complaint made by B. after the transfer to him, that he was the absolute owner of the property, it being shown by the testimony of M. that he knew of, and consented to, B.'s filing the complaint: *Held*, error. *Id.*
4. **IDEM.**—The court excluded the conversations and declarations of B. to divers parties, that he was the owner of the property: *Held*, error. *Id.*
5. **SALE—WHEN FRAUDULENT.**—Where a party executes and delivers a bill of sale to another with intent to hinder, delay, or defraud his creditors in the enforcement of their claims, or to secure any benefit to himself at the expense of his creditors, the transaction is fraudulent. *Ivanovich v. Stern*, 342.
6. **IDEM—WHEN NOT FRAUDULENT.**—A debtor has a right to protect his property from being sacrificed, provided he does not do so at the expense of his creditors. Where a sale is made to a party who agrees to immediately pay all the vendor's creditors in full, the transaction is not fraudulent. *Id.*
7. **IDEM—FRAUDULENT REPRESENTATIONS.**—Where Y. was induced to part with his property to I. and C., under the false promise that they would pay all his debts, and prevent his property from being sacrificed, such statements having been made by them for the purpose of misleading and deceiving him, so as to enable them to secure the possession of the property: *Held*, that such a sale would be fraudulent, and that Y. would be entitled to relief upon that ground. *Id.*
8. **ACTUAL POSSESSION—EMPLOYMENT OF CLERK OF VENDOR.**—The mere fact of the re-employment of the clerk of the vendor by the vendees does not render a sale of personal property invalid. *Id.*
9. **FRAUDULENT SALE.**—An instruction which declares that if the sale was actually made with the intention to hinder, delay, and defraud the creditors of the vendor, and the vendee had knowledge of such intention, then the sale was fraudulent: *Held*, correct. *Id.*

ADMISSIBILITY OF EVIDENCE TO ESTABLISH FRAUD. (See Evidence, 11.) 341.

SHERIFF.

1. **SHERIFFS' FEES—CONTRACT.**—If a sheriff, for the sake of obtaining employment, agrees in advance to render official services for a party to a suit, and to receive nothing unless such party recovers in the action, he will

be bound by his agreement, and can not recover his fees without showing that such party did recover in the suit. *Barker v. McLeod*, 148.

2. **IDEM—DISSOLUTION OF ATTACHMENT—PROCEEDINGS IN BANKRUPTCY.**—The adjudication of bankruptcy dissolves an attachment, and vests the title to the property in the assignee. The sheriff is not thereafter entitled to recover any costs for keeping the property. *Id.*
- SHERIFF'S RETURN—CLERICAL MISTAKE.** (See Mistake, 1.) 115.
- FEES IN SUMMONING A JURY.** (See Fees, 5.) 124.
- FEES TAKING PRISONER BEFORE COURT.** (See Fees, 6.) 124.
- ATTENDANCE ON COURT.** (See Fees, 7.) 124.
- SERVICE OF SUBPENA IN ANOTHER COUNTY.** (See Fees, 8.) 124.

STATE ASYLUM.

ACT TO ESTABLISH STATE ASYLUM UNCONSTITUTIONAL. (See Constitution. 2.) 202.

STATEMENT.

1. **PARTICULARS MUST BE STATED.**—A statement must specify the particulars in which the evidence is alleged to be insufficient, or it will be disregarded. *Dick v. Bird*, 161; *Dick v. Caldwell*, 167.
2. **STATEMENT NOT CONTAINING ALL THE EVIDENCE.**—Where the statement does not show that it contains all the evidence, it will be presumed that the findings were supported by the evidence. *Gamma v. Russell*, 171.
3. **STATEMENT MUST BE FILED IN TIME.**—A statement on motion for new trial which was not filed within the time allowed by law, should, on motion, be stricken out. (*Williams v. Rice*, 13 Nev. 235, affirmed.) *Harrison v. Lockwood*, 263.
4. **STATEMENT—OBJECTIONS TO, WHEN WAIVED.**—When counsel appear and orally argue a case upon its merits, and afterwards, by leave of the court, file a brief, and therein rely upon objections to the statement: *Held*, that the oral argument upon the merits amounted to a waiver of the objections to the statement. (Hawley, J., dissenting.) *Truckee Lodge v. Wood*, 293.
5. **TRANSCRIPT ON APPEAL—WHAT PAPERS AND DOCUMENTS SHOULD BE STRICKEN OUT.**—The minutes of the court and all other matters not embraced in the statement on appeal, judgment-roll, or authenticated as by law required, should, on motion, be stricken from the transcript on appeal. *Greely v. Holland*, 320.
6. **STATEMENT NOT CONTAINING ALL THE EVIDENCE.**—When the statement on appeal does not purport to contain all the evidence: *Held*, that this court is bound to presume that there was evidence sufficient to sustain the findings of the court. *Id.* 321.

STATUTES.

1. **CONSTRUCTION OF STATUTE ADOPTED FROM ANOTHER STATE—PRESUMPTION.**—The rule that where a statute has received a judicial construction

- in another state, discussed: *Held*, that the decision of another state can not be presumed to be known to the legislature of this state, antecedent to its official publication. *Hunter v. Truckee Lodge*, 24.
2. TRANSCRIBING TESTIMONY FOR THE GOVERNOR.—It is the duty of the district judge to transmit the testimony in a capital case to the governor. (1 Comp. Laws. 2088.) The statute does not authorize the clerk to perform any such duty, or to make any charge therefor. *State ex rel. Beck v. Washoe Co.*, 66.
 3. DISTRICT JUDGES—STATUTE CONSTRUED.—*Held*, that since the passage of the act of February 27, 1866 (Stat. 1866, 140, sec. 1), the first judicial district has been entitled to but one judge. *State ex rel. Aude v. Kinkead*, 117.
 4. REPEAL OF STATUTES.—When the provisions of an unconstitutional act attempt to repeal a former statute: *Held*, that the repealing clause falls with the act. *State ex rel. Keyser v. Hallock*, 202.
 5. RIGHTS OF STOCKHOLDERS—DUTY OF SUPERINTENDENT—STATUTE CONSTRUED.—In construing the provisions of the act to protect the rights of stockholders in the mines of this state (Stat. 1877, 80; Stat. 1879, 57): *Held*, that the superintendent can not be held guilty of a misdemeanor for refusing to permit the qualified stockholders to examine the mine. *Ex parte Diederheimer*, 311.
 6. IDEM—PENAL STATUTE.—Penal laws should be plainly written, so that every one may know with certainty what acts or omissions constitute the crime. *Id.*
 7. REWARD—STATUTE CONSTRUED.—In construing the statute authorizing and requiring the payment of rewards in certain cases (Stat. 1877, 92): *Held*, that it has no application to offenses committed against the United States, and tried in the United States courts, but applies to persons who violate the state law, and who are arrested under process issued out of state courts, and who are therein convicted. *Sias v. Hallock*, 332.
 8. IDEM.—The reward, provided for in the statute, must be paid to the person or persons making the arrest. *Id.*
 9. CONSTRUCTION OF STATUTE—INTENTION OF LEGISLATURE.—In order to reach the intention of the legislature, courts may modify, restrict, or extend the meaning of the words used in a statute so as to meet the evident policy of the act. *Ex parte Siebenhauer*, 365.
 10. IDEM—ABSURD RESULTS SHOULD BE AVOIDED.—The meaning of the words may be sought by examining the context; by considering the reason or spirit of the law or the causes which induced the legislature to enact it. The subject-matter and policy of the law may be invoked, and the statute should be so construed as to avoid absurd results. *Id.*
 11. IDEM—LICENSE TAX—MEANING OF WORD "SOLICITOR."—The word "solicitor," as used in the act to reincorporate Virginia City, Stat. 1879, 79, applies to individuals who are engaged or employed specially for the purpose of soliciting, importuning, or entreating for the purchase of goods as an independent occupation or business for a profit or as a means of livelihood. (Hawley, J.) *Id.*

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STOCK.

1. CERTIFICATES OF STOCK—TRANSFER OF—TRUE OWNER, WHEN ESTOPPED FROM ASSERTING TITLE.—Certain certificates of mining stock, issued in the usual form, in the name of, and indorsed by, C. & Co., as trustees, were delivered by plaintiff to M. as collateral security for an indebtedness then due to M. M. delivered the certificates to G., who had full

knowledge of the former transaction. Plaintiff, thereafter, tendered to M. & G. the full amount of the indebtedness. G., thereafter, claiming to be the owner, employed defendants as stock brokers to sell said certificates in the stock board of San Francisco. Defendants sold the same and the proceeds were placed to G.'s credit. Defendants had no knowledge of the previous transaction and were not aware that plaintiff claimed any interest in the certificates: *Held*, that plaintiff was estopped from asserting her title to the certificates as against the defendants. *Stone v. Marye*, 362.

STOCKHOLDERS.

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SURETIES.

1. PROMISSORY NOTE—PAYMENT OF BY SURETY—RIGHTS OF SURETY.—Where a surety pays a promissory note, and has the same assigned to him, and commences an action upon the note: *Held*, that he is entitled to maintain an action of implied assumpsit for the amount paid, but he can not sustain an action upon the note. *Frevert v. Henry*, 191.
2. LIABILITY OF SURETIES—WHEN NOT RELEASED.—The sureties upon an undertaking on appeal are not released by the mere delay of plaintiff in bringing suit. The agreement with the principal to delay the commencement of suit must amount to an estoppel upon the creditor sufficient, in law, to prevent him from beginning a suit before the expiration of the extended time. *Quillen v. Quigley*, 215.
3. IDEM—NOTICE BY SURETY.—Sureties can not release themselves from liability by simply giving notice to the creditor to enforce his demand against the principal debtor. *Id.*
4. CONTRACT—RIGHT OF SURETIES.—*Held*, that the failure of plaintiff to make the weekly payments as specified in the contract released the sureties upon the contractor's bond. *Truckee Lodge v. Wood*, 294.
5. IDEM—*Held*, that the failure to retain money, in excess of \$10,800, until the completion of the contract, as agreed upon, released the sureties. *Id.*
6. IDEM—*Held*, that if plaintiff permitted and requested changes to be made without previously agreeing upon the price of the same as specified, it was such a material change in the contract as would release the sureties. *Id.*
7. LIABILITY OF SURETIES CAN NOT BE CHANGED WITHOUT THEIR CONSENT.—The liability of a surety can not be changed without his consent, even though such change is advantageous to him. *Id.*

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2. IDEM.—The statute of limitation applies to suits brought by the state for the collection of delinquent taxes. *Id.*
3. IDEM—CIVIL PRACTICE ACT—DEMURRER.—The defendant in a suit brought for the collection of delinquent taxes has a right to interpose a demurrer to the complaint upon any of the grounds set forth as a cause of demurrer in the civil practice act. *Id.*
4. IDEM.—The provisions of the civil practice act, not inconsistent with the revenue laws, are applicable to suits brought for the collection of taxes. *Id.*
5. IDEM—MISJOINDER OF CAUSES OF ACTION.—Taxes due the state on the proceeds of mines for the different quarters of each year, can not be united in the same cause of action. Every quarterly or yearly tax constitutes a separate and independent liability. (Beatty, C. J., dissenting.) *Id.*
6. IDEM—DEBTS—IMPLIED CONTRACTS.—Taxes are not debts in the sense that they are obligations or liabilities arising out of contracts express or implied. They are the enforced proportional contribution of each citizen and of his estate, levied by the authority of the state for the support of the government. They owe their existence to the action of the legislature, and do not depend for their validity or enforcement upon the individual assent of the taxpayer, but operate *in invitum*. (Beatty, C. J., dissenting.) *Id.*

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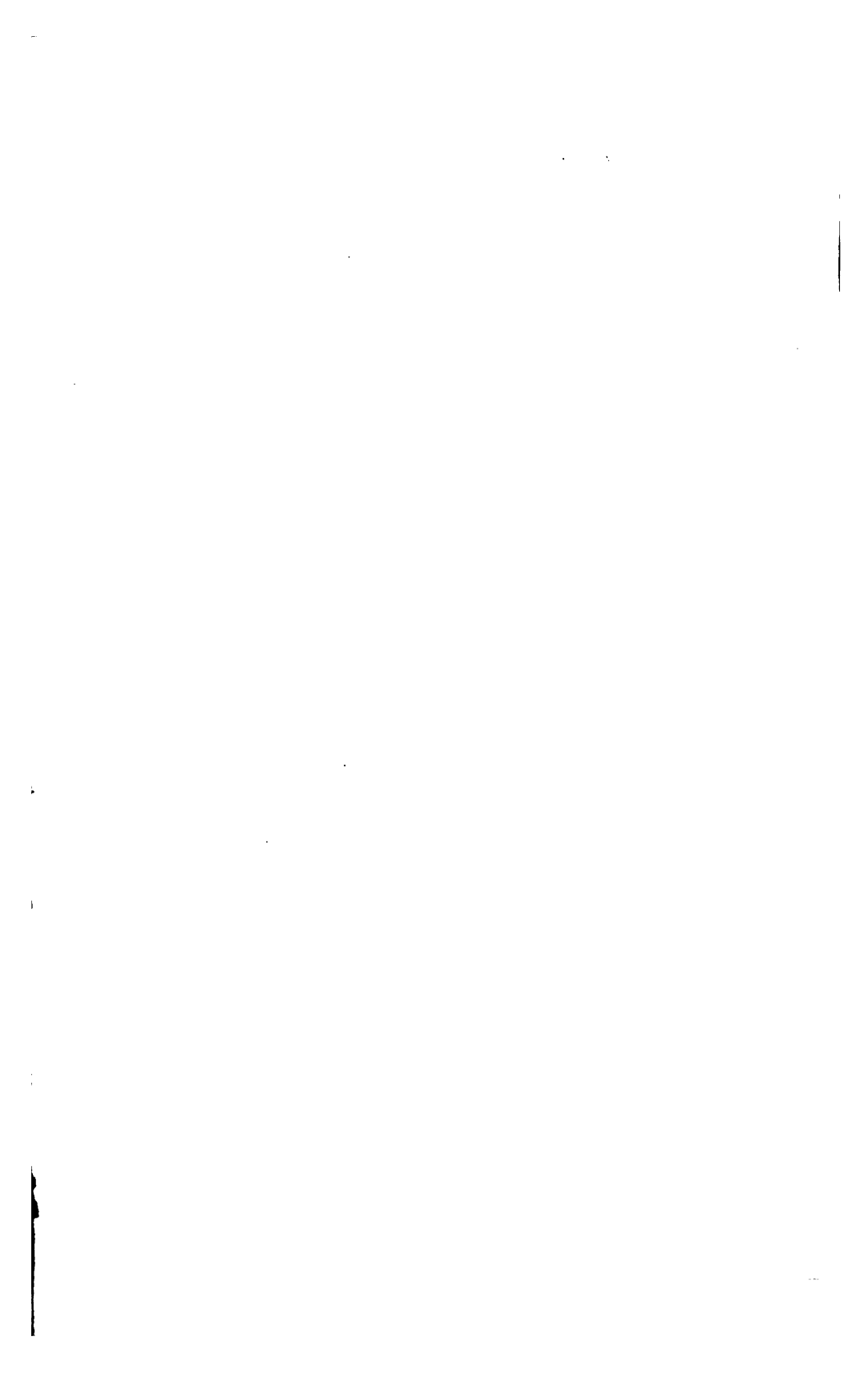
WITNESS.

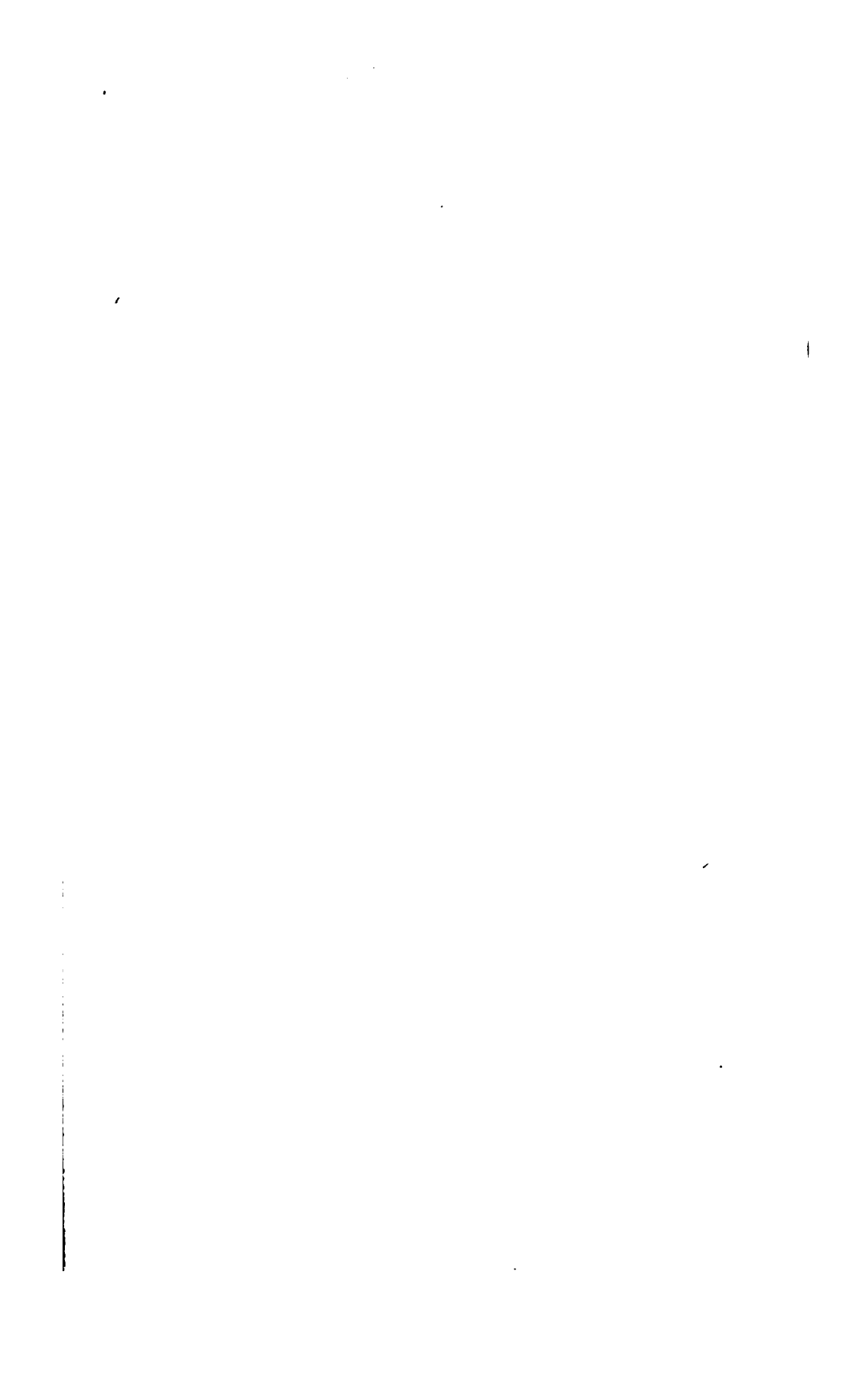
1. CROSS-EXAMINATION OF WITNESS. — The testimony of a witness upon cross-examination should be confined to matters testified to upon his examination in chief. *Buckley v. Buckley*, 262.

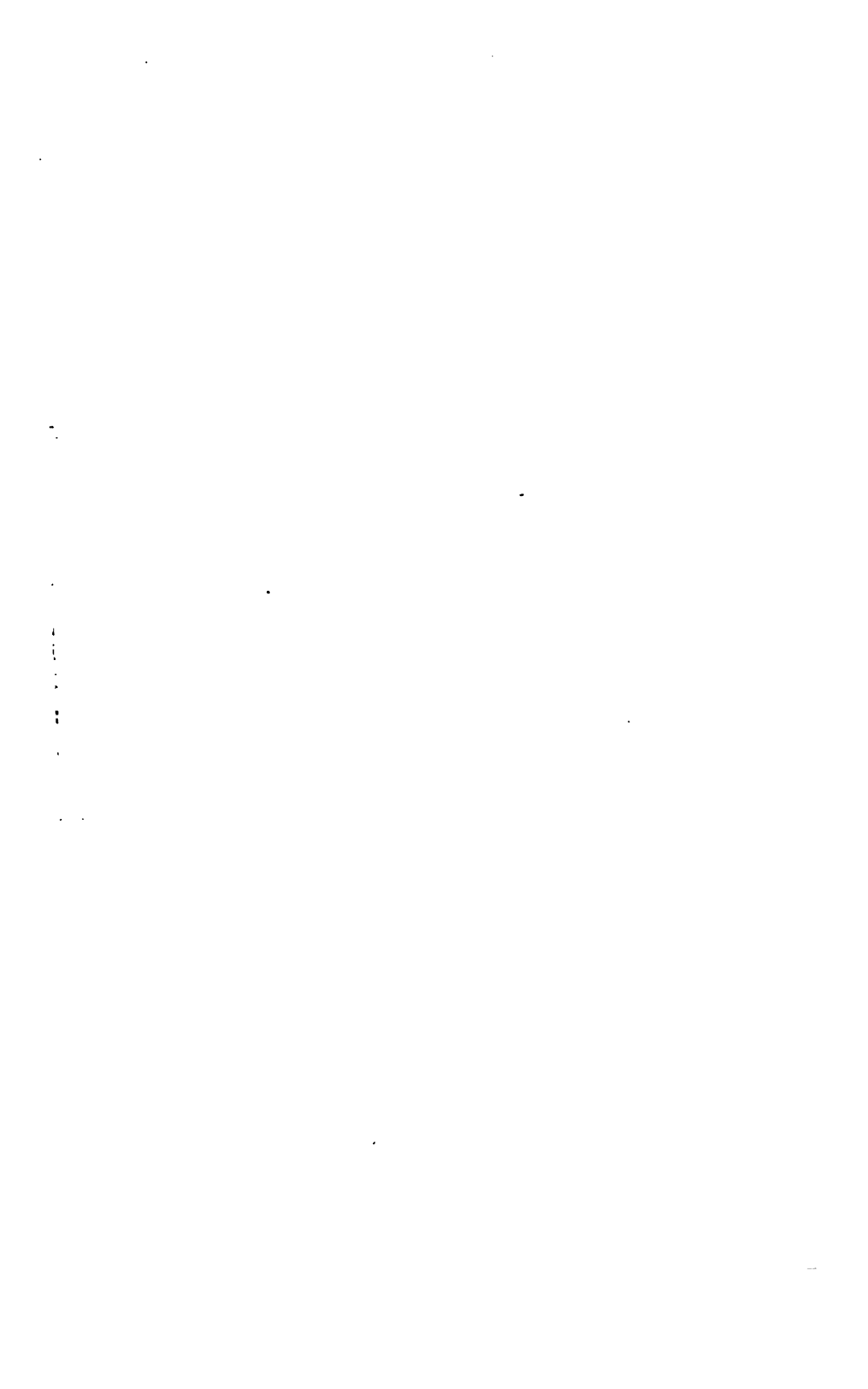
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